TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 172.

THE NEW ORLEANS GAS LIGHT COMPANY, PLAINTIFF IN ERROR,

vs.

THE DRAINAGE COMMISSION OF NEW ORLEANS, THE SEWERAGE AND WATER BOARD, SUCCESSOR, SUBSTITUTED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

FILED JANUARY 18, 1904.

(12,135.)

(19,195.)

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a UNITED STATES OF AMERICA:

Supreme Court of the State of Louisiana.

THE NEW ORLEANS GAS LIGHT COMPANY, Plaintiff in Error,
versus
THE DRAINAGE COMMISSION OF NEW ORLEANS, THE Sewerage and Water Board, Successor, Substituted, Defendant in Error. } No. 13897.

Messrs. Buck, Walshe & Buck, for plaintiff in error.
Messrs. Howe, Spencer & Cocke and Omer Villeré, for defendant in error.

Writ of error to the supreme court of the State of Louisiana from the Supreme Court of the United States of America, returnable at the city of Washington, D. C., within thirty days (30) from the fourteenth day of December, A. D. 1903.

Transcript of Record.

1 STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans.

Civil District Court for the Parish of Orleans.

Stamp.

NEW ORLEANS GAS LIGHT COMPANY
vs.
THE DRAINAGE COMMISSION OF NEW ORLEANS. } No. 60609. Civil District Court, Division "E."

Petition of Plaintiff.

Filed November 3rd, 1899.

To the honorable the judges of the civil district court in and for the parish of Orleans, State of Louisiana:

The petition of the New Orleans Gaslight Company, a corporation duly created and existing by virtue of special laws of this State as hereinafter more fully set forth, herein suing by A. H. Sieward, its president, with respect shows:

That the Drainage Commission of New Orleans, a body corporate, created and existing under and by virtue of the laws of the State of Louisiana, particularly act No. 114 of the Acts of the Session of the Legislature of 1896, and acts amendatory thereof, having its domicile

in the city of New Orleans, parish of Orleans, and whereof R. H. Walmsley is president, is justly and legally indebted unto your petitioner in the full sum of four thousand and sixty-five and
2 58/100 dollars, being balance due of a total indebtedness of sixty five hundred and forty six and 96/100 dollars on account of which the sum of twenty four hundred and eighty-one and 38/100 — has been paid as per Exhibit A annexed and filed herewith as part of this petition, to which further reference will be made hereinafter.

And your petitioner shows and avers that said indebtedness accrued and said sum became due to petitioner for the reasons and in the manner following, to-wit:—

That your said petitioner The New Orleans Gaslight Co. in the various acts passed by the legislature of this State, particularly act No. 97 of the Acts of 1870, approved April 20th, of said year: and act No. 106 of the Acts of 1873, approved July 10th of said year, and acts amendatory thereof all of which constitute the charter of your petitioner, your petitioner was granted the exclusive right and privilege of making and selling gas for illuminating and other purposes in the city of New Orleans for a certain period, fixed, expiring in the year 1925: and for that purpose was specially authorized by various provisions in said legislative enactments, more especially in section 9 of said act of April 20th, 1870, to construct and lay through the streets, alleys and ways of the city of New Orleans mains, pipes and conduits at its own expense as same might be required for the conduct of its business or for the purpose of carrying out the objects of said charter.

Petitioner shows that the business of making and selling illuminating gas and delivering same for consumption could not possibly be carried on in any other way or manner and the laying of such mains pipes and conduits was and is an absolute necessity to the conduct of the business and the carrying out of the objects for which your petitioner was incorporated by the laws of this State.

Petitioner shows that it has regularly, uninterruptedly and without interference by any private or public authority exercised the rights thus granted and has laid and constructed at great ex-
3 pense a large, valuable and extensive system of mains pipes and conduits in and through nearly every street of this city, with service connections in and to houses where gas is consumed through which said gas is delivered for consumption and use.

And your petitioner avers that its said charter is a solemn and binding contract between itself and the State and people of Louisiana: and all the rights, privileges and immunities conferred therein protected from all impairment both by the law and constitution of the State of Louisiana and by the Constitution of the United States as will hereinafter more specifically — set forth.

And now your petitioner further shows that the defendant herein through its agents and officers acting under and by virtue of said act No. 114 of the Acts of 1896 entitled "An act to provide for the

drainage of the city of New Orleans to establish the Drainage Commission of New Orleans and to provide ways and means and funds for such drainage: to provide for the issue and payment of bonds: and to direct the co-operation of the board of commissioners of the Orleans levee district" in carrying out or attempting to carry out the functions and duties imposed upon it by said act, has interfered with, molested, injured and damaged the mains, pipes, conduits and works of your petitioner, causing it pecuniary loss and injury in the amounts hereinabove set forth and more specially detailed in the exhibit herewith filed.

That it claims under said legislation to have authority to establish and construct drainage canals of its own device and at its own will in any and all the streets and public ways and places in the city of New Orleans where the pipes, mains and conduits of plaintiff have been heretofore legally and under proper authority located and installed and to give such dimensions and section to such canals as it may choose without any regard to the rights or property of plaintiff or others: and has so located and constructed canals
4 on streets and places where the pipes and mains of plaintiff are situated.

Your petitioner shows that said drainage commission through its officers and agents in view of the alleged public character of its work asserts as matter of law the right to invade and damage the property of your petitioner without incurring any liability for compensation for the injury done.

That sometime in the month of August, 1898, as the work of said commission progressed it first came in conflict and contact with the mains of petitioner: and your petitioner was notified to remove its mains and pipes at its own expense to permit the drainage work to proceed or they the officers and agents of said drainage commission, alleging their right on the ground hereinabove set forth threatened to do so themselves.

Petitioner shows that through its officers and employees it refused to comply with the request to change or remove the mains and pipes, etc., upon the ground, first: that its property could not be interfered with under any conditions in the manner threatened for any cause or reason whatsoever: and, secondly, that if it were true as matter of law that the objects for which the drainage commission was created and the works which it had to construct involved the exercise of an act of a high public nature which would authorize the taking or damaging of private property, that such taking or injuring could not be consummated without compensation duly and previously made. And this contention led to an understanding between the parties that in view of the difficulty and hazardous nature of the work and the technical knowledge and skill requisite to its proper execution, plaintiff herein, The New Orleans Gaslight Co. would do the work complained to be necessary change its mains, pipes and conduits in conformity with the plans made by the engineers of the drainage commission, keep a full and accurate account

of the actual cost of such work, and that it, the drainage commission, would pay such costs.

That upon these terms and conditions changes and alterations were made beginning with Aug. 13th, 1898, correct accounts
5 kept and bills rendered, and on the 31st day of July 1899, the defendant, The Drainage Commission, paid to plaintiff on account of work done under said arrangement the sum of $2481.38—duly credited on the account.

Petitioner shows that the defendant however, thereafter and before such payment had been made asserted that it only made such payment by reason of the positive promise and agreement previously entered into: that it would make no further payments and recognized no further liability for the reasons hereinabove set forth; namely, that it had the absolute right to execute the drainage work according to the terms of the law without reference to the rights of your petitioner and without incurring liability in any manner for the injury which it might be compelled to inflict in the prosecution of its work.

Your petitioner shows that it at all times insisted upon its rights in the premises and threatened to stop the progress of the work of the drainage commission by appealing to the courts of the country for writs of injunction to protect it in the peaceable and undisturbed possession, use and enjoyment of its property.

Whereupon again considering the great public interest involved and for the reasons above set forth of the danger of permitting any break of interference with the pipes and mains of the plaintiff except by its own experience- and skillful workmen, it was agreed without prejudice to the rights of petitioner that it would continue to make changes in the location and construction of its pipes and mains when notified to do so, the officers and agents of the drainage commission keep account of the expenses and that the question of liability be submitted for adjudication to the courts of justice.

That under this agreement your petitioner did continue to make changes and alterations, keeping account of the expense with full statement of nature and extent of work, date when done, place where, etc. up to and including the 18th of Oct. 1899—which
6 is fully set forth in Exhibit A already annexed and filed herewith and now specially referred to for further certainty as a full and complete account of work done under the conditions above set forth and the cost thereof to your petitioner; showing after crediting same with the amount paid as hereinabove admitted, a balance due of four thousand and sixty-five and 58/100 dollars.

Now your petitioner shows that the said drainage commission, defendant, is responsible to petitioner as aforesaid for the reasons:

First. That your petitioner is informed and believes that the interference with and injury to the works of petitioner were not absolutely necessary and the works of the drainage commission could have been constructed without inflicting the loss and damage complained of.

Second. If such work was necessary in the interest of a public work, still acts done and rights claimed under pretended authority of said act No. 114 of the Acts of Session of 1896 by the defendant impair the obligation of the contract between the plaintiff and the State of Louisiana in violation of article 1 section 10 of the Constitution of the United States; and of act 166 of the constitution of this State; or said acts are and constitute a taking and damaging of private property for a public purpose which carries with it and imposes the legal obligation to make just and adequate compensation for the injury inflicted by such taking or damaging.

And petitioner shows that section 8 of said act No. 114—which purports to give to said drainage commission the right to expropriate property—vests all the power and obligations of the State itself, in this regard, in said drainage commission, and imposes on said — commission liability for property expropriated or damaged: and in so far as said section 8 confers a "right in all streets" in the city of New Orleans: such "right" must be held to have been conferred subject to prior grants: and to the extent that this may be denied and absolute right claimed—said section 8
7 especially is as to petitioner null, void and unconstitutional under said art. 1, section 10, Constitution of the United States, and art. 166 of the State constitution.

Plaintiff avers that it has made amicable demand on the defendant for the payment of the amount claimed, and payment has been refused.

Wherefore plaintiff prays that defendant, The Drainage Commission of New Orleans through its proper officer may be cited to appear and answer this petition, and after due proceedings there be judgment condemning said drainage commission to pay to petitioner the full sum of four thousand and sixty five and 58/100 dollars with legal interest from judicial demand until paid, and all costs of this suit: and petitioner reserves all legal rights and remedies to either resist further loss or damage or to recover as herein the amount thereof.

And it prays for such other and further aid, remedy and relief as the nature of the case may require and law and equity permit.

(Signed) BUCK, WALSHE & BUCK, *Att'ys.*

EXHIBIT "A."

Statement of the New Orleans Gas Light Company, Annexed to and Made Part of Petition.

Filed November 3rd, 1899.

NEW ORLEANS, *October 18th*, 1899.

The Drainage Commission of New Orleans and the National Contracting Co. to the New Orleans Gas Light Co., Dr.

8

1899.				
Aug.	13.	Labor repairing services on St. Louis from Romain to Claiborne St.	$1.50	
"	20.	Labor repairing services on St. Louis from Romain to Claiborne St.	2.00	
"	27.	Labor repairing services on St. Louis from Romain to Claiborne St.	3.50	
Sept.	3.	Labor repairing services on St. Louis from Romain to Claiborne St.	2.15	
Sept.	3.	Labor repairing service cor. St. Louis & Villere Sts.	4.00	
"	"	Labor cutting off 4" main cor. St. Louis & Villere Sts.	7.75	13.15
"	10.	Labor cutting off 4" main cor. St. Louis & Villere Sts.	8.25	
"	24.	Labor straight-ning 6" main Claiborne & St. Louis Sts.	3.50	
"	"	Cutting of 3" main St. Louis & Claiborne Sts.	4.00	
"	30.	Labor repairing 6" main on Marias & St. Louis Sts.	30.40	23.50
		12 ft. 6" pipe 36c.	4.32	
		1 double branch 6 x 4 133 lbs. 4c.	5.32	
		15 lbs. lead 5½c.	83	
		4 lbs. yarn 11c.	44	
		8 blocks 2c.	16	
		1 1¼ brass plug	26	
		Cartage 4 loads 75c.	3.00	
"	30.	Service moved from St. Louis 501 Villere 9 ft. ¾ lead pipe 11c.	90	44.73
		6 ft. ¾ W. I. pipe 6¼c	38	
1-¾ brass cock			1.13	
1-¾ " bend			46	
1¾ square "			19	

9

1-¾ spring "			20	
1-¾ male connection			39	
1-¾ female connection			28	
1-¾ mall elbow			04	
			$3.97	$81.38
1898.				
Sept.	30.	Amount forward	3.97	81.38
Sept.	30.	1-1 x ¾ brass bushing	68	
		10 ft. cypress lumber 3½	35	
		2 loads breeze 25c.	50	
		Cartage	4.00	
Oct.	1.	Labor putting in service Villere & St. Louis.		9.50
"	8.	Examining mains & locating traps, Villere bet. St. Louis & Toulouse.		4.00
"	"	Labor putting in syphon at St. Louis & Villere Sts.	3.00	6.65
		2 ft. ¾ lead pipe 11c	22	
		13 " ¾ iron pipe 6¼	81	

		2-¾ brass bends 46c		92	
		4-¾ square " 20c		80	
		1-¼ brass plug		11	
		2-¾ couplings 9c		18	
		3-1" brass plugs 20		60	
		1 small syphon pot 194 lbs. 4c		7.76	
					14/40
"	"	Labor putting in syphon, at St. Louis and Basin Sts.		5.00	
		1 small syphon pot 195 lbs. 4c		7.80	
		1 ft. ¾ lead pipe		11	
		7 " ¾ iron " 6½c		44	
		1 ft. ¾ brass bend 46c		46	
		4-¾ square " 20		80	
		1-¾ " brass plug		11	
		1-¾ brass female connection		28	
		1-1 x ¾ long brass bushing		69	
		1-1½ x 1¼ short brass bushing		41	
					16.10
10					
"	"	Labor cutting off 4" main St. Louis & Basin Sts			3.00
"	29.	Labor putting syphon at Marias & St. Louis Sts.		4.00	
		1 ft. 1¼ iron pipe		16	
		1 " 1" " "		09	
		11 " ¾" " 6½c		69	
				4.94	$135.03
Oct.	29.	Amounts forward		$4.94	$135.03
"	"	1-1" spring bend		29	
"	"	4-¾ square " 19		76	
"	"	2-¾ spring " 20		40	
"	"	1-¾ elbow		04	
"	"	1-1¼ x 1¼ reducer		15	
"	"	1-1 x ¾ "		06	
"	"	Cartage		1.00	
					7.64
"	30.	Laying new lay—by on S. W. Claiborne & Canal in place of the old one on Canal & Claiborne to make room for drainage canal 84 ft. of 20" pipe 2 15		180.60	
		108 ft. of 6" pipe 40c		43.20	
		99 " " 4" " 30c		29.70	
		2 single branches 4 x 4 216 lbs. 4c		8.64	
		1 reducer 20 x 6 180 lbs. } 1 " 20 x 4 138 " } 318 lbs. 4½c		14.31	
		1-6" sleeve 52 lbs. 4c		2.08	
		1-6 " bend 133 lbs. } 1-4" " " 186 " } 402 lbs. 4c 1-4" bend 83 lbs. }		16.08	
		2-4" caps 24 lbs. 4c		96	
		1-4" Chapman valve		18.25	
		1-3 x 2 brass reducer		3.38	
		499 lbs. lead 5½c		27.44	
		24 " yarn 11c		2.64	
11		3079 ft. lumber bracing & foundation 10.00		30.79	
		114 blocks 2c		2.28	
		6 bbls. coke 30c		1.80	
		2-2" brass plugs 68c		1.36	
		2-1½" brass plugs 31c		62	
		Wagers of pavers		39.75	
		98 new brick 8.00		78	
		¼ bbl. Portland cement 3.00		1.50	
		1 " sand		30	
		4 loads breeze 25		1.00	
		Amount forward		$427.46	$142.67

1898.					
Oct.	30.	Amount forward			$142.67
"	"	Cartage 40 loads		20.00	
		Wages of bricklayers		1.40	
		Wages of laborers, engineer & foreman		411.20	
					860.06
Nov.	5.	Labor relaying & leveling 6" main Marias & St. Louis Sts			18.75
"	"	Labor putting syphon at Canal & Basin Sts		4.00	
		11 ft. ¾ iron pipe 6¼c		69	
		1-¾ spring bend		20	
		2-¾ malleable bend 4½c		09	
		4-¾ iron couplings 9½		38	
		1-1¼ x ¾ brass bushing		37	
					5.73
"	12.	Labor making connection with 16" & 4" main Canal & Basin Sts		6.00	
		11 ft. of 1½" lead pipe 25c		2.75	
		2-¾ male brass connections 39c		78	
		17 ft. cypress lumber 3½c		60	
					10.13
Dec.	17.	Labor cutting of 3" main Customhouse & Basin Sts.		7.00	
"	"	Labor looking after 12" main Burgundy & Canal Sts.		3.00	
					10.00
12					
"	24.	Labor cutting of 4" main cor. Canal & Basin Sts. & locating mains Canal & Basin & Canal & Dauphine Sts			14.00
"	27.	Labor relaying 4" main on Bienville crossing Basin drainage canal		14.00	
		1 pipe hanger & stringer 35 lbs.		1.05	
		10 blocks 2c		20	
		Cartage 3 loads		1.50	
					16.75
		Amount forward			$1088.09
1898.					
Dec.	27.	Amount forward			1088.09
"	29.	Labor relaying 4" main on Conti crossing Basin street drainage canal		31.25	
		24 ft. 4" pipe 30		7.20	
		1-4" sleeve 30 lbs. 4c		1.20	
		2 pipe hangers & stringers 60 lbs. 3c		1.80	
		24 lbs. lead 5½c		1.32	
		4 lbs. yarn 11c		44	
		15 blocks 2c		30	
		2-1" brass plugs 20c		40	
		Cartage 5 loads		2.50	
					46.41
1899.					
Jan'y	7.	Labor locating and watching 4" main cor. Canal & N. Rampart Sts			4.50
"	14.	Labor locating & watching 12" main on Burgundy & Canal Sts		10.50	
Jan'y	14.	Labor locating and marking off 6" main on Royal & Canal Sts		3.75	
					14.25
"	"	Labor raising & changing 16" main Canal & Basin Sts		5.15	
"	"	Labor staking off 16" main & 20 main at Perdido & Basin Sts		8.30	
					13.45

13

Jan'y 21.	Labor locating & watching on Canal & Dauphine Sts		6.50	
" "	Labor straightening & hanging 12" main, Canal & Burgundy Sts		5.50	
" "	Labor locating & staking off 6" x 12" main on Canal & Chartres Sts		8.00	
				20.00
" 28.	Labor locating & watching 6" main Canal & Royal Sts		17.00	
" "	Labor locating & staking off 6" main Canal & Camp Sts		12.00	
				29.00
" 31.	For loss on sales of gas on St. Louis bet. Romain & Basin Sts. from Sept. 15th 1898 to Jan'y 31st 1899, 4½ months at $20.00			90.00
	Amount forward			$1305.70
1899.				
Jan'y 31.	Amount forward			1305.70
Feb'y 1.	Labor repairing 6" main on neutral ground Canal cor. Camp St		5.00	
	4 ft. of 6" pipe 40c		1.60	
	1-6" sleeve 52 lbs. 4c		2.08	
	25 lbs. lead 5½c		1.31	
	5 " yarn 11c		55	
Feb'y 1.	2-1¼" brass plugs 26c		52	
	Cartage		1.00	
				12.06
" 3.	Labor raising and straight-ning 6" main on neutral ground across Canal St. from Chartres to Camp St.			11.00
" 4.	Labor watching & locating 12" mains at Camp & Canal & Chartres Sts			33.00
" 28.	For loss on sales of gas on St. Louis bet. Romain & Basin Sts. for month of Feb'y 1899			20.00

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Mar. 4.	Labor relaying 6" main on Customhouse crossing Claiborne drainage canal		33.25	
	5 blocks 2c		10	
	Cartage 2 loads		1.00	
				34.35
" "	Labor staking off & locating main Bienville & Chartres Sts			2.50
" 18.	Labor locating & staking off 6" & 3" mains Conti & Chartres Sts		3.25	
" "	Labor watching 3" main Bienville & Chartres Sts		5.00	
				8.25
" 31.	Labor relaying 3" main on Customhouse crossing Basin		27.75	
	60 ft. of 3" pipe 26c		15.60	
	1-3" sleeve 14 lbs. 4c		56	
	2 lbs. lead 5½c		11	
	3 " yarn 11c		33	
	40 ft. lumber 10.00		40	
	Amounts forward		$44.75	$1426.86
Mar. 31.	Amounts forward		$44.75	$1426.86
" "	15 blocks 2c		30	
Mar. 31.	2-1" bras- plugs 20c		40	
	Labor paving		10.00	
	Cartage 7 loads 50c		3.50	
	2 pipe hangers 1.25		2.50	
				61.45

Mar.	31.	For loss on sales of gas on St. Louis bet. Romain & Basin Sts. for month of March 1899	.....	20.00
"	"	Services of engineer & foreman	.....	75.00
April	1.	Labor locating & watching 6" main Canal & Basin Sts	.....	2.50
"	15.	Labor staking off 4" main both sides of Common & Basin Sts.	.....	4.00
"	17.	Labor connecting 4" main on Basin on north banquette of St. Louis for syphon on neutral ground		
15		on N. E. corner Basin & St. Louis Sts.	34.00	
		156 ft. of 4" pipe 27½c.	42.90	
		L single branch 4 x 4 108 lbs. 4c.	4.32	
		1 reducer 4 x 4 67 lbs. 4c.	2.68	
		1-4" sleeve 30 lbs. 4c.	1.20	
		150 lbs. lead 5½c.	8.25	
		10 " yarn 11c.	1.10	
		300 ft. lumber 10.00	3.00	
		40 blocks 2c.	80	
		1-1" brass plug	20	
		Cartage 3 loads 75c	2.25	
				100.70
"	29.	Labor watching 4" main south side Tulane Ave. & Basin Sts.	8.50	
"	"	Labor cutting off 3" main Basin & Tulane Ave.	2.00	
"	"	Labor cutting off 3" main Basin & Gravier Sts.	2.50	
April	29.	Labor cutting off plugging up 4" main cor. Tulane Ave. & Basin broken by contractors of drainage commission	4.45	
				17.45
		Amount forward	.....	$1707.96
1899.				
April	29.	Amount forward	.....	$1707.96
"	"	Labor laying 4" main on north banquette of St. Louis bet. Franklin & Villere Sts. also on south banquette of St. Louis bet. Marais & Villere Sts. 18 ft. on Franklin, 24 ft. on Liberty 12 ft. on Villere.	255.20	
"	"	1320 ft. 4" pipe 27½c.	363.00	
		1 double branch 6 x 4 133 lbs. 4c.	5.32	
		5 single branches 4 x 4 540 lbs. 4c.	21.60	
		1-6" sleeve 52 lbs. 4c.	2.08	
		2-4" spring bends 120 lbs. 4c.	4.80	
16		2-4" caps 24 lbs. 4c.	96	
		1-3" " 8 " 4c.	32	
		740 lbs. lead 5½c.	40.70	
		31 " yarn 11c.	3.41	
		2000 ft. lumber 10.00	20.00	
		292 blocks 2c.	5.84	
		Cartage 25 loads 75c.	18.75	
				741.89
"	"	Services of engineer & foreman	.....	125.00
"	30.	For loss on sales of gas on St Louis bet. Romain & Basin Sts. for month of April 1898	.....	20.00
May	4.	Labor connecting 4" main on Tulane Ave. crossing Basin on both sides cur by drainage commission.	23.50	
		60 ft. 4" pipe 30c.	18.00	
		1 double branch 4 x 4 133 lbs. 4c.	5.32	
		1-4" sleeve 30 lbs. 4c.	1.20	
		1-4" square bend 67 lbs. 4c.	2.68	
		2-4" caps 24 lbs. 4c.	96	
		54 lbs. lead 5½c.	2.97	
		5 " yarn 11c.	55	
		20 ft. lumber 10.00	20	
		21 blocks 2c.	42	

		2–1″ brass plugs 20c	40	
		Cartage 6 loads 50c	3.00	
		1 pipe hanger	1.15	
				60.35
		Amount forward		$2655.29
1899.				
May	4.	Amount forward		$2655.29
"	5.	Labor laying 4″ main on south banquette of St. Louis from Marais to Liberty St	29.00	
		264 ft. 4″ pipe 27½c	72.60	
		1–4″ cap 12 lbs. 4c	48	
		110 lbs. lead 5½c	6.05	
17		6 " yarn 11c	66	
		450 ft. lumber 10.00	4.50	
		60 blocks 2c	1.20	
		1–1″ brass plug	20	
		Cartage 7 loads 75	5.25	
				119.94
"	6.	Labor staking off 4″ mains Poydras & Basin Sts	4.00	
"	"	Labor watching 12″ main Gravier & Basin Sts	4.50	
"	"	Labor cutting off 2″ x 4″ mains Perdido & Basin Sts	5.00	
				13.50
"	13.	Labor staking off 4″ main cor. Lafayette & Basin Sts		2.00
"	15.	Labor relaying 3″ main on south banquette of St. Louis from Claiborne to Romain, crossing Romain	139.50	
		96 ft. 3″ pipe 26c	24.96	
		2 single branches 3 x 3 138 lbs. 4c	5.52	
		1–3″ sleeve 14 lbs. 4c	56	
		3–3″ caps 24 " 4c	96	
		26 lbs. lead 5½c	1.43	
		6 " yarn 11c	66	
		150 ft. lumber 10.00	1.50	
		275 blocks 2c	5.50	
		Cartage 10 loads 75c	7.50	
				188.09
"	19.	Labor relaying 4″ main on north banquette of St. Louis from Claiborne to & crossing Romain St	53.50	
		672 ft. of 4″ pipe 27½c	184.80	
		2 single branches 4 x 4 215 lbs. 4c	8.60	
		3–4″ caps 36 lbs. 4c	1.44	
		Amounts forward	$248.34	$2978.82
1899.				
May	19.	Amounts forward	$248.34	$2978.82
18				
"	"	344 lbs. lead 5½c	18.92	
		25 " yarn 11c	2.75	
		908 ft. lumber 10.00	9.08	
		190 blocks 2c	3.80	
		2–1¼ brass plugs 26c	52	
		2–1″ " " 20c	40	
		Cartage 11 loads 75c	8.25	
				292.06
"	20.	Labor laying 4″ main on Perdido crossing north & south banquettes of Basin St	17.00	
		48 ft. 4″ pipe 30c	14.40	
		10 lbs. lead 5½c	55	
		1 lb. yarn	11	
		Cartage 2 loads	1.00	
				33.06

May	20.	Labor cutting off 4″ main Basin & Poydras Sts	4.00		
"	"	Labor cutting off 4″ main Basin & Perdido Sts	7.50		
"	"	Labor watching at Perdido & Basin Sts	5.50		
"	"	Labor staking off main Girod & Basin Sts	2.00		
					19.00
"	"	Syphon on Common S. cor. Basin St.:			
		16 ft. ¾ iron pipe 6¼c	1.00		
		4–¾ square bends 19c	76		
		1–¾″ brass plug	12		
		2–¾″ couplings 9½c	19		
					2.07
"	"	Labor repairing service 1201 Perdido cor. Basin	2.00		
		3 ft. of ¾ lead pipe 11c	33		
		1–¾″ brass bend	46		
		1–¾″ male connection	39		
		1–¾″ female "	28		
		4 ft. cypress lumber 3½c	14		
					3.60
19		Amount forward			$3328.61
1899.					
May	20.	Amount forward			$3328.61
"	"	Labor repairing service 1333 Poydras cor. Basin	7.00		
		3 ft. of ¾″ lead pipe 11c	33		
		6 ft. of ¾ iron pipe 6¼c	38		
		1–¾″ brass cock	1.13		
		1–¾″ spring bend	18		
		1–¾″ coupling	10		
		4 ft. cypress lumber 3½c	14		
					9.26
"	24.	Labor laying 4″ main on north & south banquettes of St. Louis from Villere to Robertson St	63.50		
		540 ft. 4″ pipe 27½c	148.50		
		2–4″ sleeves 60 lbs. 4c	2.40		
		2–4″ caps 24 lbs. 4c	96		
		230 lbs. lead 5½c	12.65		
		11 " yarn 11c	1.21		
		810 ft. lumber 10.00	8.10		
		115 blocks 2c	2.30		
		3–1″ brass plugs 20c	60		
		Cartage 14 loads 75c	10.50		
					250.72
"	27.	Labor watching 4″ main Poydras & Basin	7.00		
"	"	Labor making 2 connections with 20″ gas main & 16″ drainage main in Perdido St. bet. Rampart & Basin Sts	14.50		
"	"	Labor cutting off 3″ main Basin & Poydras Sts	2.50		
		4 ft. of 2″ galv. iron pipe 27c	88		
		3–2″ nipples 21	63		
		2–2″ brass cocks 3.95	7.90		
		1–2″ union	38		
20		1–1″ brass plug	20		
					33.99
"	29.	Labor raising 20″ main on Perdido crossing Basin, & cutt'g off stand pipe from 16″ main Perdido & Basin Sts	15.00		
		1–6″ cap 20 lbs. 4c	80		
					15.80
		Amount forward			$3638.38

May	29.	Amount forward	.....	$3638.38
"	30.	Labor repairing services 1401 to 1719 & from 1719 to 1831 St. Louis & at 500 N. Franklin	66.00	
		8 ft. 1¼ lead pipe 20c	1.60	
		17 " 1" " " 18c	3.06	
		94 " ¾" " "	10.34	
		7 " 1¼" iron " 11c	77	
		15 " 1" " " 7c	1.05	
		36 " ¾" " " 6¼c	2.25	
		2-¾" brass cocks 1.62	3.24	
		5-¾" " " 1.13	5.65	
		1-1¼" " bend	79	
		3-1" " " 63c.	1.89	
		23-¾" " " 46	10.58	
		1-1" square "	25	
		4-¾" " " 18c.	72	
		1-1¼" spring "	29	
		8-¾" " " 20	1.60	
		1-1¼" mall "	09	
		1-¾" " "	04	
		1-1" male connection	51	
		11-¾" " " 39c	4.29	
		1-1" female "	39	
		6-¾" " " 28c	1.68	
		1-1¼" coupling	13	
		1-1" "	11	
		1-¾" "	09	
		2-1" elbows 6¼c	13	
		6-¾" " 4c	24	
		1-¾" brass plug	12	
21		102 ft. cypress lumber 3½c	3.57	
				121.47
"	"	For loss on sales of gas on St. Louis from Romain to Basin Sts. for month of May 1899	.....	20.00
"	"	Service of engineer & foreman	.....	125.00
		Amount forward	.....	$3904.85
1899.				
May	30.	Amount forward	.....	$3904.85
June	3.	Labor watching 4" main at Lafayette & Basin Sts.	.....	2.50
	4.	Labor connecting 4" main to 16" drainage main Per-ido & Basin Sts.	8.75	
		12 ft. 4" pipe 30c	3.60	
		2-4" spring bends 90 lbs. 4c	3.60	
		1-4" square 60 " 4c	2.40	
		1-4" cap 12 " 4c	48	
		45 lbs. lead 5½c	2.48	
		3 " yarn 11c	33	
		Cartage 2 loads	1.00	
				22.64
"	10.	Labor watching 4" main cor. Girod & Basin Sts	.....	3.00
"	12.	Labor laying 2" galv. W. I. pipe for drainage on Gravier bet. Basin & Rampart & Rampart from Gravier to Perdido	369.25	
		773 ft. of 2" galv. W. I. pipe 27	208.71	
		2-2" nipples 6¼c	12	
		2-2" unions 44c	88	
		3-2" elbows 31c	93	
		1-2" tee	38	
		2-2" brass cocks 2.70	5.40	
		22 loads breeze 25c	5.50	
		1-1¼ brass plug	26	
22		Cartage 51 loads 50	25.50	
				616.93

June	14.	Labor connecting 3″ pipe to 12″ main on Gravier & Basin Sts	4.00	
		12 ft. 3″ pipe 26c	3.12	
		1 " 3″ bend 45 lbs. 4c	1.80	
		1-3″ cap 8 lbs. 4c	32	
		5 lbs. lead 5½c	27	
		½ " yarn 11c	06	
				9.57
		Amount forward		$4559.49
June	14.	Amount forward		$4559.49
"	15.	Labor repairing 4″ main cor. Girod & Basin Sts	6.00	
		2½ lbs. lead 5½c	14	
		½ " yarn 11c	05	
		Cartage	50	
				6.69
"	17.	Labor repairing 4″ main cor. Gravier & Basin Sts	5.00	
"	"	Labor cutting off 4″ main Girod & Basin Sts	2.00	
"	"	Labor staking off 4″ main Julia & Basin Sts	2.00	
"	"	Labor repairing service 1200 Gravier St	1.50	
		Labor cutting off service 1133 Gravier St	1.50	
				12.00
"	23.	Labor laying 4″ main on Basin from Tulane Ave. to Gravier St	98.05	
		296 ft. 4″ pipe 30c	88.80	
		1-4 x 4 single bra-ch 108 lbs. 4c	4.32	
		1-4 x 4 reducer 76 lbs. 4c	3.04	
		188 lbs. lead 5½c	10.34	
		10 lbs. yarn 11c	1.10	
		375 ft. lumber 10.00	3.75	
		104 blocks 2c	2.08	
		3-1″ brass plugs 20c	60	
		1-¾ " "	12	
23		Cartage 18 loads 50c	9.00	
				221.20
"	24.	Labor connecting 4″ main with 2″ drain pipe Gravier & Basin Sts	20.00	
		61 ft. service lumber 4c	2.44	
		1-2″ iron tee	38	
		41 ft. of 1¼″ pipe 19c	7.79	
		1 " 1¼ brass bend	90	
		1-1¼″ " female connection	76	
		1-2 x 1¼ iron bushing	44	
		Cartage 1 load	50	
				33.21
				$4832.59
1899.				
June	24.	Amount forward		$4832.59
"	"	Labor repairing service Gasquet & Liberty Sts	11.00	
		50 ft. of ¾″ iron pipe 6¼c	3.13	
		3-¾″ mall bends 4c	12	
		2-¾″ long screws 25c	50	
		3-¾″ couplings 9c	27	
		1-1 x ¾ reducer	06	
		1-¾″ square bend	19	
		1-¾″ spring "	23	
		1-¾″ coupling	09	
				15.59
"	"	Labor repairing service 214 S. Basin St	3.00	
		7 ft. of ¾″ lead pipe 11c	77	
		5 " " ¾″ W. I. " 6¼c	30	

		1-¾" brass bend	46	
		1-¾" square "	19	
		1 ¾" spring "	23	
		1 ¾" female connection	28	
		8 ft. cypress lumber 3½c	28	
				5.51
"	"	Labor repairing service 220 S. Basin St	3.00	
24		4 ft. of ¾ lead pipe 11c	44	
		2 " " ¾" W. I. " 6½	12	
		1-¾" brass bend	46	
		1-¾" square "	19	
		1-¾" spring "	23	
		1-¾" female connection	28	
		1-¾" coupling	09	
		5 ft. cypress lumber 3½c	18	
				4.99
"	30.	Service of engineer & foreman up to June 30th 1899 on all foregoing work except St. Louis St. & Canal cor. Claiborne St. jobs		400.00
		Amount forward		$5258.68
1899.				
June	30.	Amount forward		$5258.68
July	1.	Labor cutting off & taking down 4 lamp posts on Julia from Carondelet to Magazine St	4.00	
		4-¾" brass plugs 12c	48	
				4.48
"	"	Labor cutting of 5" main Rampart St. cor. of Julia 4" main Rampart E. cor. of Julia 4" main W. cor. of Julia	8.50	
"	"	Labor staking off & watching 4" main cor. Baronne & Julia		4.50
"	"	Labor staking off 12" main Baronne & Julia		2.50
"	8.	Labor putting in service at 1133 Gravier		6.00
"	"	Labor putting in syphon Rampart S. cor. of Julia	5.00	
		15 ft. of ¾" W. I. pipe 9	1.35	
		4-¾" square bends 19	76	
		1-¾" elbow	05	
				7.16
"	"	Labor watching 4" & 12" main Julia & Baronne		9.00
25				
"	"	Labor staking off 4" & 6" mains Julia & Baronne Sts.		2.50
"	15.	Labor staking off mains on Julia both sides of St. Charles		5.00
"	"	Labor watching 4" & 16" mains Julia & Carondelet Sts		9.50
"	22.	Labor staking off 6" & 4" mains cor. Camp & Julia Sts		4.00
"	"	Labor watching 4" main St. Charles & Julia Sts		7.50
"	"	Labor putting in syphon cor. St. Charles & Julia	5.00	
		6 ft. of ¾" W. I. pipe 9c	54	
		4 ft. ¾" square bends 19c	76	
		1-1" brass plug	20	
		1-¾" " "	11	
		1-¾" coupling	05	
				6.66
		Amount forward		$5335.98
1899.				
July	22.	Amount forward		$5335.98
"	29.	Labor staking off 6" main on Magazine & Julia & watching same for pile driver		7.50
July	29.	Labor watching 6" & 4" main Camp & Julia Sts		6.00
"	"	Labor connecting 5 main on St. Charles & Julia broken by digger	7.50	

		8 ft. 6″ pipe 45c	3.60	
		1 " 6″ sleeve 52 lbs. 4c	2.08	
		45 lbs. lead 5½c	2.47	
		3 " yarn 11c	33	
		5 blocks 2c	10	
		2 1″ brass plugs 20c	40	
		Cartage 2 loads	1.00	
				17.48
26				
Aug.	5.	Labor extending & drilling mains cor. Poydras & Basin to let out water	11.55	
"	"	Labor staking off main Julia & Constance Sts	3.00	
"	"	Labor watching 4″ main Julia & Magazine	7.50	
				22.05
"	12.	Labor staking off main cor. St. Joseph & Constance	4.00	
"	"	Labor watching pile driver	2.00	
				6.00
				5395.01
"	12.	Labor staking 5″ main cor. Delord & Constance	4.50	
"	"	Labor watching 4″ main cor. St. Joseph & Constance Sts	5.00	
				9.50
"	26.	Labor watching pile driver & digger cor. Delord & Constance Sts		10.00
		Amount forward		$5414.51
1899.				
Aug.	26.	Amount forward		$5414.51
1899.				
Aug.	26.	Amount forward		$5414.51
"	31.	Labor laying 4″ main on Basin 483 ft. bet. Gravier & Perdido & 444 ft. bet. Perdido & Poydras Sts. on east banquette of *of* Rampart	186.90	
		927 ft. 4″ pipe 31c	287.37	
		3-4 x 4 single branches 327 lbs. 4c	13.08	
		1-4″ sleeve 31 lbs. 4c	1.24	
		2-4″ spring bends 128 lbs. 4c	5.12	
		525 lbs. lead 5½c	28.88	
		17 " yarn 11c	1.87	
		1375 ft. lumber 10.00	13.75	
		225 blocks 2c	4.50	
27		6-1″ brass plugs 20c	1.20	
		Cartage 24 loads 50c	12.00	
				555.91
"	"	Services of engineer & foreman		90.00
Sept.	2.	Labor staking off 4″ & 2″ mains Camp & Girod Sts.		4.50
"	9.	Labor cutting off 4″ main cor. Camp & Gravier and cor. Camp & Common, and staking off 4″ & 12″ mains Camp and Common	20.25	
"	"	Labor staking off 4″ & 12″ mains Camp and Gravier Sts	4.00	
		Labor staking off 6″ main cor. Camp & Poydras Sts.	4.00	
		Labor watching pile driver & digger at Camp & Girod Camp & Poydras & Camp & Gravier	12.00	
				40.25
"	16.	Labor staking off 6″ main Camp & Canal Sts	4.00	
		Labor watching pile driver & digger cor. Camp & Gravier & cor. Camp & Common Sts	4.50	
				8.50
"	23.	Labor watching digger Camp cor. Common & Camp cor. Canal		6.00
		Amount forward		$6119.67

1899.				
Sept.	23.	Amount forward		$6119.67
"	29.	Labor taking up and re-laying 4″ main on E. side of Camp from Gravier towards Common up to #206 Camp St.	71.40	
		1–4″ sleeve 31 lbs. 4c	1.24	
		1–4″ cap 12 " 4c	48	
		100 lbs. lead 5½c	5.50	
		4 lbs. yarn 11c	44	
		261 ft. lumber 10.00	2.61	
		50 blocks 2c	1.00	
		1–1¼″ brass plug 26 1–1″ brass plug 20c.	46	
		Cartage 5 loads 50c	2.50	
				85.63
Oct.	14.	Labor watching digger Claiborne bet. Canal & Gasquet		7.50
Oct. 28	18.	Labor relaying 6″ 4″ & 3″ mains on S. banquette of Julia from Baronne to Rampart crossing Julia at Rampart in place of pipe broken by pile driver	189.75	
		12 ft. 6″ pipe 45c	5.40	
		66 " 4″ pipe 31c	20.46	
		12 " 3″ pipe 29c	3.48	
		1–6″ sleeve 52 lbs. 1–4″ " 31 lbs. 1–3″ " 14 lbs. } 97 lbs. 4c	3.88	
		133 lbs. lead 5½c	7.20	
		12 lbs. yarn 11c	1.32	
		100 ft. lumber 10.90	1.00	
		158 blocks 2c	3.16	
		1–1¼″ brass plug 26c. 5–1″ brass plug @ 20	1.00	
		5 loads breeze 25c	1.26	
		Cartage 12 loads 50c	1.25	
			6.00	
				244.16
"	"	Services of engineer & foreman		90.00
		Credit		$6546.96
1899. July	31.	By cash on account		2481.38
				$4065.58
				325.00
				$3740.58

(Endorsed on face in red ink:) Approved after deducting $325.00 for three thousand seven hundred and forty 58/100 (Signed) B. M. Harrod ch'f suy.

Exception of No Cause of Action.

Filed November 10th, 1899.

29 Civil District Court, Division —.

NEW ORLEANS GAS LIGHT CO.
vs.
DRAINAGE COMMISSION OF NEW ORLEANS. } No. 60609.

And now comes the defendant, The Drainage Commission of New Orleans, and for premptory exception to the plaintiff's petition, says that it discloses no cause or right of action against this defendant.

Wherefore, the premises considered, defendant prays that this exception be maintained and that the plaintiff's suit be dismissed at its cost.

(Signed) HOWE, SPENCER & COCKE,
Att'ys — Def't.

Continued.

Extract from Minutes of Division "E."

FRIDAY, *January 26th*, 1900.

Present: The Honorable Geo. H. Theard, judge.

The exceptions in the following case were ordered continued to Friday, February 9th, 1900.

N. O. GAS LIGHT CO.
vs.
DRAINAGE COMMISSION OF N. O. } 60609.

Continued.

Extract from Minutes of Division "E."

FRIDAY, *February 9th*, 1900.

Present: The Hon. Geo. H. Theard, judge.

The following exception was ordered continued to Friday, February 16th, 1900, at 11 a. m.

N. O. GAS LIGHT CO.
vs.
DRAINAGE COMMISSION OF N. O. } 60609.

Continued.

Extract from Minutes of "Division "E."

FRIDAY, *February 16th*, 1900.

Present: The Hon. Geo. H. Theard, judge.

30 The following exception was ordered continued to Friday, February 23rd, 1900.

N. O. GAS LIGHT CO.
vs.
DRAINAGE COMMISSION OF N. O. } 60609.

Continued.

Extract from Minutes of Division "E."

FRIDAY, *February 23rd*, 1900.

Present: The Hon. Geo. Theard, judge.

The following exception was ordered continued to Friday, March 2nd, 1900, at 11 a. m.

N. O. GAS LIGHT CO.
vs.
DRAINAGE COMMISSION OF N. O. } 60609.

Submitted.

Extract from Minutes of Division "E."

FRIDAY, *March 2nd*, 1900.

Present: The Hon. Geo. H. Theard, judge.

The exception herein filed by defendant on February 5th, 1900, came on this day for trial.

Present: Chas. F. Buck, Esq., for plaintiff; W. B. Spencer, Esq., for defendant & exceptor.

And the said exception having been argued and submitted the court took the same under advisement.

Exception Overruled.

Extract from Minutes of Division "E."

MONDAY, *March 26th*, 1900.

Present: The Hon. Geo. H. Theard, judge.

For the reasons this day orally assigned by the court, the court considering that the exception herein is not well founded:

It is ordered that the exception herein filed by defendant on November 10th, 1900, be overruled.

Answer of Defendant.

Filed May 3rd, 1900.

31 Civil District Court, Div. E.

NEW ORLEANS GAS LIGHT COMPANY
vs.
THE DRAINAGE COMMISSION OF NEW ORLEANS } No. 60609

Now into court, through undersigned counsel, comes the defendant and reserving unto itself the benefit of the exception heretofore filed and overruled and in no wise waiving same for answer to the plaintiff's petition, says:

1. It denies all and singular the facts and allegations therein contained save only such as may hereinafter be expressly admitted.

2. It admits that it was created by and organized under the provisions of act 114 of 1896 and acts amendatory of and supplemental to said act for the purpose of providing for the drainage of the city of New Orleans.

3. It, admits that it claims under the provisions of said laws to have authority to establsh and construct drainage canals in any and all streets and public places of the city of New Orleans where same may be deemed necessary to accomplish the purpose for which it was created, and to give such canals such locations and dimensions — may be necessary to properly drain the city.

4. It admits that in the establishment and construction of drainage canals, it came in contact with the mains and conduits owned and constructed in public streets by the plaintiff company, and that, as hereafter set forth, it required the plaintiff to so remove or change the location and position of its said conduits as not to obstruct or impair the efficiency of said drainage canals.

5. It avers that by said acts of the legislature aforesaid, it was charged with full power to control and execute the drainage of the city of New Orleans, and was authorized to execute and carry out substantially the plan for such drainage adopted by the council of the city of New Orleans by ordinance No. 10091, council
32 series, approved July 10th, 1895, so far as it might find said plan desirable and practicable, with the right however, to change or modify the same as in its judgment circumstances might require.

That it was further vested with the right of eminent domain and the right, in all streets and over all lands of the State and city in the parishes, Orleans, Jefferson, and St. Bernard, was granted for any of its works, and generally with reference to the accomplishment of the construction of said drainage system was vested with the police power of the State.

6. It avers that under the powers so conferred, it has proceeded to the establishment and construction of said drainage system as so adopted in the city council as aforesaid, save only where same has been modified for its improvement in the judgment of said commission. And in the prosecution thereof has preceeded to lay and construct drainage canals of proper and reasonable dimensions in and through various streets of this city.

7. It admits that the plaintiff company, claiming authority under certain acts of the legislature, set forth in its petition has laid under the surface of various streets certain mains and conduits, and that for the proper construction, maintenance, and efficient use of said drainage canals, it was necessary and proper that the location of said mains and conduits should be and were required to be changed.

8. This defendant denies, however, that it acted unreasonably or oppressively or in any wise illegally in so requiring the moving of said mains and conduits, and denies that it is liable to said plaintiff in any sum whatever on that account, but, on the contrary, it avers that it acted in a reasonable and prudent manner and solely with a view to securing and efficient and proper drainage system as required by law, and that it had the right to require in the construction of this public work the plaintiff to so conform its mains and con-
33 duits as not to obstruct or impair the efficiency of said system.

Wherefore, the premises considered, defendant prays that the plaintiff's suit be rejected at its costs, and for general relief.

(Signed) HOWE, SPENCER & COCKE,
Att'ys of Def't.

Continued.

Extract from Minutes of Division "E."

WEDNESDAY, *November 28th*, 1900.

Present: The Hon. Geo. H. Theard, judge.
The following case was ordered continued by preference.

Continued.

Extract from Minutes of Division "E."

WEDNESDAY, *December 12th*, 1900.

Present: The Hon. Geo. H. Theard, judge.
The following case was ordered continued by preference.

Continued.

Extract from Minutes of Division "E."

WEDNESDAY, *January 2nd*, 1900.

Present: The Hon. Geo. H. Theard, judge.
The following case was ordered continued by preference.

34 Civil District Court, Parish of Orleans, Division "E."

NEW ORLEANS GAS LIGHT COMPANY
vs.
DRAINAGE COMMISSION OF NEW ORLEANS. } No. 60609.

Testimony and notes of evidence taken in open court on this 16th day of January, 1901, in the above entitled cause, on behalf of plaintiff, before the Hon. George H. Theard, judge presiding.

Appearances.

Mr. Charles F. Buck, attorney for plaintiff.
Mr. W. B. Spencer, attorney for defendant.

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Reported by D. O'Day, stenographer.

By Mr. BUCK: I offer in evidence act 114 of the Acts of 1896, and act 63 of the Acts of 1898, amendatory thereof, creating and defining the rights and duties of the Drainage Commission of New Orleans.

I also offer in evidence the charter of the New Orleans Gas Light Company, particularly act 97 of the Acts of 1875 (70) passed April 1st 1875 (70), and act 106 of the Acts of 1873—the original act of incorporation, being act of 1835, at page 92 of the Acts, together
35 with the act 157 of the Acts of 1874, being an act authorizing the consolidation of business corporations &c, and the articles of consolidation of the original New Orleans Gas Light Company with the Crescent City Gas Light Company which was incorporated by the acts heretofore referred to, namely, act 97 of 1875, and act 106 of 1873. The act of consolidation in which the Crescent City Gas Light Company, was consolidated with the original New Orleans Gas Light Company, chartered under the act of 1835 and organized—the existing New Orleans Gas Light Company: all contained in pamphlet marked Exhibit "P-A," which by consent is received in evidence without any further certification.

I offer in evidence the decision of the Supreme Court of the United States in the case of The New Orleans Gas Light Company, appellant *vs.* The Louisiana Light and Heat Producing & Manufacturing Company, decided in 1885, and found in volume 115 of the Reports of the Supreme Court of the United States page 650; a copy of the decision is contained in the printed pamphlet marked Exhibit "P-B," and is received in evidence to be used in this record.

Admission. (Dictated by Mr. Spencer.)

It is admitted by counsel for defendant, that as alleged in the plaintiff's petition, in order to avoid the stoppage, or interference with the progress of the draining work, by writ of injunction, as was threatened by the plaintiff in this case, it was agreed between the parties to this suit that the New Orleans Gas Light Company should, without prejudice, remove or change the location of the various mains, conduits, etc., as required by the drainage commission, keeping an account of the cost thereof, and that the liability of the drainage commission should thereafter be determined for such cost of removal and change of location, the rights of neither party to be in any wise prejudiced by this agreement.

It is further admitted that this agreement was formally
36 recognized by the board of commissioners of the drainage commission, officially, in a resolution passed by that body, a copy of which will be put in the record.

Mr. DUNCAN JONES, being duly sworn on behalf of plaintiff, deposes and says.

Direct examination by Mr. BUCK:

Q. Mr. Jones, you are the secretary of the New Orleans Gas Light Company?

A. Yes, sir.

Q. Are you familiar with its charter, franchises, and its works?

A. Yes, sir.

Q. The charter provides a capital stock of three million seven hundred and fifty thousand dollars; do you know whether that entire stock is subscribed and issued?

A. Yes, sir.

Q. What is the market value of the stock?

A. Well, it is to-day about one hundred and four (104) bid, and one hundred and nine (109) asked.

Q. In other words the value of the capital of the company represented by this, represents three million and a half dollars?

A. Three million and three quarters.

Q. Has the New Orleans Gas Light Company any other way of delivering its gas to its customers under its charter, except through the mains laid throughout the city?

A. No, sir.

Q. Do you know about how many miles of mains are laid throughout the different portions of the city?

A. About two hundred and twelve miles.

Q. I show you a document marked "P-3," purporting to be a copy of a resolution passed by the board of drainage commissioners; the company had possession of that?

A. Yes, sir.

37 By Mr. BUCK: I offer this document in evidence marked Exhibit "P-3."

Q. This copy was sent to the New Orleans Gas Light Company?
A. Yes, sir.

Q. Haven't you a further resolution passed by the board of directors, embodying a certain agreement reached between the company and the board of commissioners of the drainage commission?
A. There has been a resolution passed by the drainage commission to the effect that they would set aside fifty thousand dollars to defray the expenses of the changes made by the company in their pipes, in consequence of the drainage work.

By Mr. BUCK: I offer in evidence copy of resolution of the drainage commission embodying the agreement set forth in the petition and admitted in the answer, marked Exhibit "P-4."

By Mr. BUCK:

Q. Mr. Jones, do you know how this controversy commenced originally; before these resolutions were passed, what, if anything, passed between the officers of the gas light company, and the officers of the drainage board, say its engineer, Mr. Harrod?
A. Well when the work was first started on St. Louis street between Roman & North Basin—at least beyond that point, beyond Roman; when they got to Roman they began to interfere with our mains and service, and some correspondence passed in regard to the injury done to the company's property, and that the company expected to be reimbursed for it, and Major Harrod and the president of our company had a few interviews in regard to it, and they arrived at an understanding that the drainage commission would pay for it. We were to keep an account of all material and time of the men, and everything pertaining to the work, and repairs and relaying of the mains, and render a bill and the bill would be paid. That we did.

Q. As a matter of fact the charges originally made by the company, and the labor and cost thereof was paid by the board
38 of drainage commissioners?
A. Yes, sir; for a portion of that work. After that payment was made then the question arose as to future payments, and while I am not positive that was the time the resolution was passed, setting aside fifty thousand dollars, that resolution was the outcome of this payment of the bill rendered by the company.

Q. Well, it was the outcome of the disposition not to obstruct the work, and that the matter would, otherwise, be protected in its legal aspect?
A. Yes, sir.

Q. Have you the figures before you, as to how much the company has expended up to this time, and how much it has been paid?
A. No, sir, not up to this time, because the bill that we rendered them, up to about the middle of last October, amounted to $6546.96, and this payment of $2481.38, for work done on St. Louis street, was

credited, and left a balance due up to that period of $4065.58. Since then work has been prosecuted on Third street, along St. Charles avenue, and, possibly one or two other places, that I don't call to mind, for which no bill has been rendered. We still keep an itemized account, and will render a bill as soon as we can make it up.

Q. I show you an account annexed to the petition, marked Exhibit "A:" Please look at the items on the account, and the résumé of it, and say whether or not it is the substance of what you have just stated?

(Document handed to witness for identification)

A. This is the bill which I have just spoken of—of October 18th.

Q. Of the work, you have no personal knowledge?

A. No, sir: I have no personal knowledge, anymore than that these materials were used.

Q. In making out the bills—these accounts—what rule does the company observe; are they reasonable and just?

A. Yes, sir.

39 Q. The actual expenses?

A. Yes, sir.

Q. Is this work done by your own employés, or is it done by others?

A. It is done by our own employés.

Q. Was anything said originally, during all these negotiations why it was preferable that the employés of the gas light company should do the work, to your knowledge?

A. It was absolutely necessary to have experienced men to do that kind of work.

Q. Does the laying of gas mains require any skill.

A. Yes, sir; it does require skill, experience and knowledge.

Q. Why?

A. Because it requires the mains to be laid with a view to their proper levels so as to drain certain points where syphons or drips are located, and from which the water which is contained in the pipes is pumped. This is absolutely necessary or otherwise the consumers would be deprived of light.

Q. There is a certain amount of condensation going on in the gas?

A. Yes, sir; certain leakage taking place in the pipes.

Q. The pipes have to be laid at a certain distance so that this water can be pumped out?

A. Yes, sir; they have to be laid at a certain distance.

Q. The board of drainage commissioners agreed that the company should do the work itself?

A. Yes, sir, as far as my knowledge goes.

Q. Can you state, approximately, how much money has been expended since that account was rendered?

A. Well, probably twenty five hundred dollars. I am speaking only from memory. I don't think it is less than that.

Q. Are you familiar with the scope of the drainage law, and its effect upon the entire work of the company, judging from your experience of the past, towards the completion of the work—what might be the possible total expense?

By Mr. SPENCER: I object to that question as irrelevant and immaterial.

By the COURT: The court rules that the objection goes to
40 the effect to be given to the evidence, and not to its admissibility.

By Mr. SPENCER: To which ruling of the court, counsel for defendant excepts, and makes this note in lieu of a formal bill of exceptions.

By Mr. BUCK:

Q. On the same ratio that the work has progressed, what would you estimate the probable injury to the company?

A. Well, I haven't exactly in my mind the extent of the drainage work, or just how far it has progressed in its completion, but it strikes me from my past experience, and the expense that we have been put to, I should think that it might amount to three times as much. Of course a great deal depends upon the locality where the canals are dug. If we have large mains in the center of a street, and we have to take them out and have to then relay the mains on each side of the street—in other words under each banquette, that of course necessitates the taking up of one main which has answered the purpose, and then relaying two mains.

Q. Has that been done in some of these instances?

A. Yes, sir. It has been done on St. Louis street, and it has to be done where they excavate from curb to curb, the main in the center of the street has to be taken up and we have to relay the mains under the banquette on both sides of the street; otherwise, we can't serve the consumer.

Q. You have no means of knowing to what extent that may become necessary?

A. No, sir.

Cross examination by Mr. SPENCER:

Q. Mr. Jones, I gather from your testimony that the first interference was when they started to dig the St. Louis Street canal?

A. Yes, sir; as far as my recollection goes.

Q. And that at first Major Harrod agreed with Mr. Sieward,
41 the president of the gas light company, that the drainage commission would pay for the actual cost of removal?

A. Yes, sir.

Q. They did pay you for that, did they not?

A. Yes, sir.

Q. Then, did you receive any notice that they would not thereafter pay anything for the expense of the removal or change of these conduits

A. I think Major Harrod wrote a letter to Mr. Sieward, something to that effect, but I don't recollect exactly what it was. Understand me, Mr. Spencer, I am not familiar with that, because I don't recollect having seen the letter; but speaking from memory, I think I recollect that Major Harrod and Mr. Sieward had a conversation and that was mentioned—at least this letter was written.

By Mr. BUCK: Understanding the object of this examination, it is admitted that after certain accounts, as stated by the witness, had been paid, Major Harrod, the engineer of the drainage commission sent a letter to the president of the gas light company, notifying him that the board was of opinion that under the law they were not responsible for these payments, and that thereafter no payments would be made for the work, and that the work would be demanded to be done, and the pipes removed, but without compensation, the point then being for the first time made that the gas company had no right to receive any compensation for this interference.

It is agreed that the letter shall be put in the record if found.

By Mr. SPENCER:

Q. The right to change the pipes was claimed by your company was it not?

A. Yes, sir.

Q. You thought it would be inadvisable to allow any one, but your experienced workmen to change them?

A. Yes, sir.

42 Q. Did you, from time to time, render the drainage commission accounts showing the amount you had expended?

A. I don't know whether there were any other bills presented. I think there were and they were returned. That I can not say from memory. This is the only account on which any payment has been made at all, that was rendered the drainage commission. I don't recollect that part of it.

By Mr. BUCK:

Q. Under whose supervision is the work done; what officer represents your company in supervising the work?

A. Albert Richter, and his assistant, J. J. Compston.

Q. Does he keep an account of the men working?

A. Yes, sir. Compston keeps an account of the time and material. Mr. O'Neils make up the account and returns it to the main office.

By Mr. SPENCER:

Q. I understand that you had nothing to do with the preparations of that account yourself?

A. No, sir.

Q. You know nothing about it?

A. No, sir; except that I saw it was entered in the books, but I did not go over the calculations.

Admission. (dictated by Mr. Buck).—It is admitted that if the engineer of the New Orleans Gas Light Company, Mr. Richter, who was expected to be called as a witness, were put upon the stand, he would corroborate the testimony of Mr. Jones, as to the special care and skill required in the laying of the gas mains to preserve the proper flow of gas and prevent the accumulation of water in the pipes, and for that reason it was agreed that the officers and employés of the gas light company should do the work themselves, keeping an account of the material and cost of labor.

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Agreement.—It is agreed between the parties that the case shall stand submitted here, with the question as to the account left open to this extent: Defendant desires time to examine it, and if it is not approved, testimony will be taken out of court to prove the account, which will complete the evidence. Otherwise, if nothing further is done, the account stands admitted to be correct as now in the record, and plaintiff here rests.

(Endorsed:) No. 60,609. Civil district court. Division "E." Offered in evidence by —— ——, plaintiff. Filed Jan. 30, 1901. A. H. Flemming, D'y clerk. No. 60,609. Civil district court, parish of Orleans, division "E." New Orleans Gas Light Co. *vs.* Drainage Commission of New Orleans. Evidence on the part of plaintiff taken Jan'y 16th, 1901, Filed —— 1901. —— —— d'y clerk. Reported by D. O'Day, stenographer.

44 Civil District Court, Parish of Orleans, Division "E."

NEW ORLEANS GAS LIGHT COMPANY
vs.
DRAINAGE COMMISSION OF NEW ORLEANS. } No. 60609.

Testimony and notes of evidence taken in open court on this 16th day of January, 1901, in the above entitled cause, on behalf of defendant, before the Hon. George H. Theard, judge presiding.

Appearances.

Mr. Charles F. Buck, attorney for plaintiff.
Mr. W. B. Spencer, attorney for defendant.

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Stamp Civil district court division "E" Reported by D. O'Day stenographer Offered in evidence by defendant Filed Jan. 29 1901 A. H. Flemming d'y clerk.

By Mr. SPENCER: Counsel for the defendant offers in evidence ordinance No. 7170, council series, adopted January 31st, 1890.

Also ordinance No. 7350, council series, adopted March 28th, 1893.

45 Also ordinance No. 8327, council series, adopted November 21st, 1893.

Also report of the drainage of the city of New Orleans, of date April 29th, 1895, marked Exhibit "D–1," which it is agreed may go up in the original in case of appeal.

Also ordinance No. 10991, council series, of the city council, adopting the report and plan of drainage, set forth in the document marked Exhibit "D–1."

Also ordinance No. 11489, council series, authorizing the city engineer to secure the services of an advisory board of engineers in the preparation of the specifications of the drainage work.

Also the specifications for the construction of a system of drainage in the city of New Orleans, prepared by the city engineer, marked Exhibit "D–2," it being agreed that this document in case of appeal, may also go up in the original.

Also an extract from the proceedings of the city council of date January 24th, 1896, adopting and approving, with amendments, the specifications hereinabove referred to, as Exhibit "D–2."

Major B. M. HARROD, being duly sworn on behalf of defendant, deposes and says.

Direct examination by Mr. SPENCER:

Q. Major Harrod, you are chief engineer of the drainage commission?

A. Yes, sir.

Q. You have been such since its organization?

A. Yes, sir.

Q. Were you a member of the advisory board of engineers that proposed to the city council certain plans and specifications in the construction of the drainage system of the city of New Orleans?

A. Yes, sir.

Q. Who were the other members of the engineering committee?

46 A. Mr. Rudolph Herring and Mr. H. P. Richardson.

Q. Do you know the members of that advisory board, their names?

A. The mayor, Mr. Fitzpatrick was a member, and Mr. Walmsley was a member.

Q. What Walmsley?

A. R. M. Walmsley. Colonel Denis was a member.

Q. J. C. Denis?

A. Yes, sir. I think for a part of the time Mr. Albert Baldwin was a member.

Q. Mr. Baldwin succeeded Mr. Edward Fenner?

A. He succeeded Mr. Edward Fenner, yes, sir.

Q. Major Harrod, I ask you whether or not you have been in active supervision and control of all that work done by the drainage commission in this city?

A. Yes, sir.

Q. I would ask you to state whether or not the drainage system being now constructed in the city, has been in accordance with the plans and specifications as adopted by the city council, by this ordinance No. 10991?

A. Yes, sir.

Q. I would ask you to state whether or not any changes have been made in that plan, and if so, in what tendency have those changes been made?

A. The entire object has been to follow out as closely as possible the original plan. Changes have been very few, and very small; changes of detail. Any changes that have been made, have been made with a view to reduction of dimensions and costs

Q. I would ask you to state whether or not the plan as adopted and as being carried in execution is necessary for the drainage of the city of New Orleans?

A. I think it is the proper plan, yes, sir, for the drainage of the city.

Q. Do I understand you to state, in the respects that the plans and

specifications have been departed from, they were in the reduction of dimensions?

47 A. Yes, sir. There had been no increase of size at all.

Q. I would ask you to state whether or not the plans and specifications, as adopted, fix the location of the various canals which the drainage commission has been constructing?

A. Yes, sir; that is shown in map 4, attached to that report.

Cross-examination by Mr. BUCK:

Q. I suppose you deemed in your knowledge as engineer, that whatever you called upon the gas light company to do in changing its mains, was necessary to carry out your ideas?

A. I think it was.

Q. Have you familiarized yourself with the location of gas mains by inquiring at the office of the company?

A. Yes, sir. I have called upon them for such information as they could furnish me, and I have seen that information myself in the office.

Q. From your knowledge, both on the one hand of the scope of the work of the drainage commission yet to be done, and your knowledge of the plans and extent of mains of the New Orleans Gas Light Company, can you form an estimate of the extent it may be necessary to remove the work on the gas mains in the completion of the plant?

A. I cannot beyond this much; the greater part of the work has been done, because the drainage in the most densely settled part of the city has been practically completed. The area that will be covered by the unfinished drainage will be quite as great as that which has already been done, but it will be in the neighborhood where the gas pipes are very probably much fewer and probably very much smaller; so I would say, excepting the point of area, the work is at least half done.

Q. But do you apprehend that further interference will become necessary?

A. We will meet with other gas pipes, I expect, in the drainage of the system.

Q. You had the inspection of this work agreed to, paying
48 the gas company for the expense necessary or incurred in doing the work, and furnishing new material?

A. Yes, sir, a certain part of it.

Q. And under that agreement certain parts of the work has been actually paid for?

A. Yes, sir.

Q. How came you to change that method of going ahead as now?

A. In both cases I acted under advice, sir.

By Mr. SPENCER:

Q. Advice of counsel, you mean?

A. Advice of counsel, yes, sir.

By Mr. BUCK:

Q. Counsel advised you at first to recommend payment?
A. They did, sir.
Q. After that they changed their opinion and advised you that the board was not liable, and you so notified the New Orleans Gas Light Company?
A. I did, sir.
Q. Your communications were amicable?
A. Entirely so.
Q. Do you know under the agreement, that was finally arrived at, that the work should continue without interference, reserving all the rights of the gas company?
A. That was the understanding, that they were to reserve their rights, and then they asked to file the accounts in my office, which I agreed to, with the distinct understanding that it did not affect the rights of either party, and after that agreement I have not considered that it was my business to examine those accounts which I have not done yet.
Q. Were you present at the meeting of the board of drainage commissioners, at which these resolutions were passed, embodying the substance of the agreement?
A. I have no doubt of it. I don't think I have ever missed more than one or two meetings. I am quite sure I was there.

By Mr. SPENCER:

49 Q. Major, wherever this interference took place, could it have been reasonably avoided with due regard to the carrying out of an efficient drainage system?
A. I think the interference was minimized as much as possible. It was my object to do so.

By Mr. SPENCER: The case is submitted, except as to such testimony as may be taken out of court, in reference to the accounts sued on.

(Endorsed:) No. 60,609. Civil district court, parish of Orleans, division, "E." New Orleans Gas Light Company *vs.* Drainage Commission of New Orleans. Evidence on behalf of defendant, taken Jan'y 16th, 1901. Filed, —— 1901. —— ——, d'y clerk. Reported by D. O'Day, stenographer.

50 *Charter of New Orleans Gas Light Company, Offered in Evidence by Plaintiff.*

Filed January 30, 1901.

50½ Charter and by-laws of the N. O. Gas Light Company as reorganized by consolidation with the Crescent City Gas Light Company, April 1, 1875.

50-1 Charter and by-laws of the N. O. Gas Light Company as reorganized by consolidation with the Crescent City Gas Light Company, April 1, 1875.

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50–3 *Charter of the New Orleans Gas Light Company as Reorganized by Consolidation with the Crescent City Gas Light Company, April 1st, 1875.*

No. 97.

An act to incorporate the Crescent City Gas Light Company.

Incorporators.

SECTION 1. *Be it enacted by the senate and house of representatives of the State of Louisiana, in General Assembly convened:* That Joseph H. Oglesby, William Creevy, Francis J. Herron, F. W. Perkins, S. D. McPherson, George F. Sherman, W. B. Cornell, W. Hawksworth, and their present and future associates, successors and assigns, be and they are hereby constituted and declared to be, from and after the passage of this act, a body corporate and politic, in fact and in name, by the style and title

Title.

of "The Crescent City Gas Light Company," and by that name they and their successors shall and may have continual succession, and shall be persons in law, capable of sueing and being sued; pleading and being impleaded; answering and being answered unto; defending and being defended in all courts and places whatsoever; and that they and their successors may have a common

Seal.

seal, and may change and alter the same at pleasure; and also, that they and their successors by

Power to hold real estate.

the same name and style shall be in law, capable of holding, purchasing and conveying any estate, real or personal, for the use of said corporation. *Provided*, That the lands, tenements and hereditaments which it shall be lawful for said

50–4 corporation to hold, shall be only such as shall be requisite for its immediate accommodation in relation to the convenient transaction of its business, and the properly carrying on and conducting of its works; or such as shall have been mortgaged to it, in satisfaction of debts contracted in the course of its dealings, or purchased at sales, upon judgments which shall have been obtained for such debts.

Capital stock $3,000,000.

SECTION 2. *Be it further enacted, etc.*, * That the capital stock of said corporation shall be three million dollars, to be divided into thirty thousand shares of one hundred dollars each.

* See agreement of consolidation, article 2, page 14.

SECTION 3. *Be it further enacted, etc.*, That books for subscription to the capital stock of said company shall be opened in New Orleans, and under the management and superintendence of the incorporators, who shall fix the time and places for receiving such subscriptions, giving due notice of the same through the daily papers; and that after seven thousand five hundred shares are subscribed, the incorporators shall call a meeting of the subscribers, for the purpose of electing a board of directors, whose term of office shall be until the first Tuesday of January following their election as such: *Provided*, * That no one shall be elected as director who is not a resident of the State of Louisiana, and the owner of one hundred shares of the stock: *Provided, further*, That the incorporators shall have the power to fix the per centum to be paid upon subscribing to the stock, and the time at which further instalments shall be called in, until the election of the first board of directors, when this power shall rest with them and their successors in office.

Subscriptions to stock.

Directors.

Qualifications.

Instalments.

SECTION 4. *Be it further enacted, etc.*, † That the office of said company shall be located in New Orleans; that the works and affairs of said company shall be managed and conducted by a board of six directors, who shall elect one of their own number president, and shall also elect a secretary; and that from and after the first election of directors, an annual election for directors shall be held on the first Tuesday of each year, due notice of the same to be given by the secretary of the company through the daily papers, for thirty days previous to the time fixed for said election; the election to be held at the office of the company, each share of stock to be entitled to one vote, either by the owner in person or by proxy, and the person receiving the highest number of votes to be declared duly elected; the board of directors to fix the compensation of the president and other officers and employees of the company.

50–5

President and secretary.

Annual election for directors.

How held.

Salaries.

SECTION 5. *Be it further enacted, etc.*, That if any director shall remove out of the State, or cease to be a stockholder, his office shall be declared vacant; and whenever any vacancy or vacancies

Vacancies How filled.

* This restriction was removed by act No. 106, (July, 1873.) See page 7, sec. 1.
† This section was amended by act No. 106, (July, 1873.) See page 7, sec. 1.

shall happen among the directors by death, resignation, or otherwise, such vacancy or vacancies shall be filled for the remainder of the year in which they shall happen by such person or persons as the remainder of the directors for the time being, or a majority of them shall appoint.

Directors shall have power

SECTION 6. *Be it further enacted, etc.*, * That a majority of the board of directors shall constitute a board for the transaction of business, and shall have power to make and prescribe such by-laws, rules and regulations as shall appear needful and proper, and shall have the power of appointing as many officers, clerks and assistants as may be necessary for carrying on the business and affairs of the company, allowing them such salary as they may see proper.

To make by-laws,

Appointments

And fix salaries.

Half yearly dividends.

SECTION 7. *Be it further enacted, etc.*, † That half-yearly dividends shall be made of so much of the profits of said company as the directors may think advisable, and that at each annual meeting for the election of directors, the outgoing directors shall lay before the stockholders a statement of all the affairs and concerns of the company for their information.

Statement of affairs

50–6 SECTION 8. *Be it further enacted, etc.*, ‡ That the Crescent City Gas Light Company, their successors and assigns, shall have and be entitled to the sole and exclusive privilege of making and vending gas lights in the city of New Orleans, to such persons or bodies corporate who may voluntarily choose to contract for the same, for the term of fifty years, from and after the date of the expiration of the charter of the New Orleans Gas Light Company.

Exclusive privilege for 50 years.

SECTION 9. *Be it further enacted, etc.*, That to carry the foregoing section into effect, they shall be authorized after the passage of this act, to lay pipes or conduits at the expense of the company, in any of the streets or alleys of said city of New Orleans, where the same may be required, in such manner as may produce the least inconvenience to the city or its inhabitants, *and provided, also*, That the company shall afterwards repair, with the least possible delay, the streets they have broken.

Power to lay pipes.

* See agreement of consolidation, article 6, page 16.
† See agreement of consolidation, article 5, page 16.
‡ See act No. 106, section 1, paragraph 5; also section 3, page 8.

Any persons destroying the property of the company to be liable for damages.

SECTION 10. *Be it further enacted, etc.*, That if any person or persons shall, by any means whatever, destroy any part of the gas pipes constructed or owned by the said company, or any of their works, buildings, fixtures, or machines, such person or persons shall, each of them, be liable for all damages occasioned thereby.

Power to purchase patents and patent rights.

SECTION 11. *Be it further enacted, etc.*, That the Crescent City Gas Light Company is authorized and empowered to manufacture gas from any and all materials suitable for such purpose, and shall have power to purchase and use any patent or patents, or the right to the same for the manufacture of such gas lights.

Works to be complete in ten years.

SECTION 12. *Be it further enacted, etc.*, That the works of said company must be complete and in condition to supply the proper amount of gas required for the city of New Orleans, within ten years from and after the date of the passage of this charter; and in case of failure the charter to be null and void.

50–7 SECTION 13. *Be it further enacted, etc.*, That all acts and parts of acts heretofore passed, conflicting in any manner with the provisions of this act of incorporation, are hereby repealed.

MORTIMER CARR,
Speaker of the House of Representatives.
OSCAR J. DUNN,
Lieutenant-Governor and President of the Senate.

Approved April 20th, 1870.

H. C. WARMOTH,
Governor of the State of Louisiana.

No. 106.

An act to amend and re-enact an act entitled An act to incorporate the Crescent City Gas Light Company, approved April 20, 1870, and to fix with more precision the time when said company shall go into operation, and to authorize said company to issue mortgage bonds, to change the time for election of directors, and to limit the price to be charged for gas.

SECTION 1. *Be it enacted by the senate and house of representatives of the State of Louisiana, in General Assembly convened*, That an act entitled An act to incorporate the Crescent City Gas Light Company, approved April 20, 1870, be so amended—

1. That the board of directors of said corporation are hereby authorized by by-laws to determine the number of said directors, which shall consist of not less than three, nor more than nine persons; that any person who is the owner of ten shares of stock may be a director. Said board shall elect a president and vice president from their own body, and a secretary and treasurer, either members or not of their own body.

Directors and officers.

2. That the annual election for the board of directors shall take place on the second Tuesday of January of each year; ten days' notice of the same shall be given through two daily papers of the city of New Orleans.

Election for directors.

3. That said corporation shall have power to issue bonds, not exceeding in amount one million of dollars, to be secured by mortgage on the works and property of said corporation; that the time of maturity and rate of interest of said bonds shall be fixed by the board of directors.

50–8

Power to issue bonds.

4. That the said corporation shall not charge more than four dollars per thousand cubic feet for gas, except in case of war or blockade.

Price of gas.

5. That the date of expiration of the charter of the New Orleans Gas Light Company, as mentioned in section eight of the charter hereby amended, is hereby declared to be the first day of April, A. D., 1875.

Date of charter.

SEC. 2. *Be it further enacted, etc.*, That all the franchises and rights granted by the act hereby amended, and by this act, be and the same are

Franchises confirmed.

hereby confirmed unto the said Crescent City Gas Light Company, from the first day of April, A. D., 1875, for the term fixed in their charter.

That sections nine and twelve of the act hereby amended shall not be deemed at all affected by this act.

SEC. 3. *Be it further enacted, etc.*, That the term "city of New Orleans," as used in the eighth section of the act hereby amended, shall be deemed to include all parts of the present city of New Orleans, and any additions which may at any time be made thereto, not conflicting in any manner with the charter of the Jefferson City Gas Light Company. Territory defined.

That all parts of the act hereby amended which conflict with this act, and so far as they conflict with this act, be and the same are hereby repealed.

That all other acts, and all parts of other acts conflicting with this act, or with the act hereby amended, be and the same are hereby repealed.

CHARLES W. LOWELL,
Speaker of the House of Representatives.
C. C. ANTOINE,
Lieutenant-Governor and President of the Senate.

Approved July 10, 1873.
WILLIAM P. KELLOGG,
Governor of the State of Louisiana.

50–9 In the Supreme Court of Louisiana.

CRESCENT CITY GAS LIGHT COMPANY
versus
NEW ORLEANS GAS LIGHT COMPANY.

Appeal from superior district court.

Extracts from the decision of the court rendered February 1, 1875, affirming the validity of the acts incorporating the Crescent City Gas Light Company.

"Are the acts of 20th April, 1870, and 10th July, 1873, incorporating the plaintiff company and conferring on it the sole and exclusive privilege of making and vending gas in the city of New Orleans for fifty years, from 1st April, 1875, repugnant to article 114 of the constitution of 1868, Are the acts constitutional.

requiring the object of every law to be expressed in the title, and likewise repugnant to said constitution, in so far as the said acts create a monopoly in favor of plaintiff?

* * * * *

"We come now to the question whether the acts incorporating the plaintiff's company, and conferring on it the sole and exclusive right to make and vend illuminating gas in the city of New Orleans for fifty years, from 1st April, 1875, are repugnant to article 114 of the constitution of 1868, then in force, requiring the object or objects of every law to be embraced in its title. And here the main objection is as to the title of the act of 20th April, 1870; that its title, "An act to incorporate the Crescent City Gas Light Company," does not cover the monopoly contained in the 8th section thereof; that there is nothing in it indicating its purpose to grant it sole and exclusive privilege to make and vend gas in the city of New Orleans for fifty years, from 1st April, 1875.

Objections stated.

50–10 To this the plaintiff replies, that, under a similar title, a monopoly of the same kind was granted to the defendant in the charter of 1835, which was recognized by this court in the case of Paulding, (12 Rob., 378,) and which has been enjoyed by the defendant for nearly forty years without its validity having been questioned by any one. But the object of the act, as stated in the title, was "to incorporate the Crescent City Gas Light Company." To incorporate a company is to create it with certain powers and privileges, which need not be detailed, for if they were the title would be as long as the act. The title of the act disclosed the creation of a gas company; this was sufficient to cover the monopoly, or exclusive privilege to make and vend gas.

Title sufficient to cover monopoly.

"The precise question was before this court in The Louisiana Lottery Company *vs.* Richoux *et al.*, (23 A., 743,) and also in The State *ex rel.* Belden *vs.* Fagan, (22 A., 546,) where it was held that an exclusive privilege or monopoly could be granted under the usual title to incorporate a company. And in their decision it was held that the State could create a monopoly; that it could give the Crescent City Slaughterhouse Company the exclusive privilege to keep a slaughterhouse, and that it could confer on the Louisiana Lottery

State can create a monopoly.

Company the exclusive privilege to sell lottery tickets.

"However odious monopolies may be, the sole question for the court to determine in this case is, had the legislature the power under the constitution to grant to plaintiff the sole and exclusive right to manufacture and sell illuminating gas in the city of New Orleans for fifty years? If they had the power, they cannot be controlled by the judicial department in the exercise thereof, however unwisely they have chosen to employ it. Their responsibility is not to the court, but to the people, whose agents they were, for this unwise, unfair and arbitrary exercise of the power of legislation confided to them. In its own sphere the legislature is supreme, except when restricted by the constitution of the State, or of the United States.

Legislature supreme.

"Now what clause of these constitutions
50-11 has been violated in the case at bar? Is the bill of rights: All persons "shall enjoy the same civil, political and public rights and privileges, and be subject to the same pains and penalties," in any manner invaded? Is "life, liberty or the pursuit of happiness" of any person in the city of New Orleans assailed by the statute, granting the sole and exclusive privilege to plaintiff to operate gas works in New Orleans for fifty years? The right to operate gas works and to illuminate a city is not an ancient or usual occupation of citizens generally. No one has the right to dig up the streets and lay down gas pipes, erect lamp posts, and carry on the business of lighting the streets and the houses of the city of New Orleans, without special authority from the sovereign. It is a franchise belonging to the State, and in the exercise of the police power the State could carry on the business itself, or select one or several agents to do so. And as the legislature had the right in 1835, to grant the sole and exclusive privilege to the defendant company to make and vend gas in New Orleans for forty years, the legislature of 1870 had the same power to confer on the plaintiff the same privilege for fifty years from the termination of the grant to defendant. We, therefore, conclude that the grant of the monopoly complained of does not violate the constitution, and it is valid.

Gas lighting a public franchise belonging to the State.

Grant of monopoly is valid.

"In regard to the intervention of the city of

City's right of purchase.

New Orleans, we will remark that the right reserved by the State for it to become purchaser of the gas works, fixtures, machines, pipes, etc., at the expiration of the charter of the defendant, was not such a vested right that the State could not withdraw or recall without contravening that provision of the Constitution of the United States prohibiting a State from impairing the obligations of a contract. Conceding that the authority given to the city, if she saw fit, at the expiration of defendant's charter, to purchase the gas works, by implication conferred authority to operate said works, the State had the right to recall or withdraw the authority, as it did in the act of 1870, before the time for using the authority arrived.

Withdrawn by act No. 97.

And the grant of the sole and exclusive privilege to plaintiff to make and vend gas is utterly repugnant to the right of any other person or corporation to make and vend gas in New Orleans. And this grant, by implication, revoked or recalled any previous authority given the city to buy the gas works of the defendant on 1st April, 1875, for the purpose of making and vending gas.

50–12

"The powers and privileges granted by the State to the city of New Orleans, and other political corporations used in the administration of government, may be recalled or modified by the legislature at pleasure. And in doing so they violate no contract protected by the Constitution of the United States.

"We therefore conclude that the intervention of the City of New Orleans cannot be maintained.

Decree.

"It is, therefore, ordered that the judgment herein be set aside and annulled, and it is decreed that the plaintiff, The Crescent City Gas Light Company, have the sole and exclusive right to make and sell illuminating gas in the city of New Orleans for fifty years from April 1, 1875; that the act of March 1, 1860, extending the charter of the defendant, The New Orleans Gas Light Company, from April 1, 1875, until April 1, 1895, is unconstitutional and void; and that the defendant be enjoined and inhibited from setting up any claim thereunder, or from attempting to carry on the operation of gas works or the business of making and vending gas after the 1st April, 1875, or from in any manner impeding the plaintiff from the full enjoyment of its franchises, rights and privileges, arising under the acts of April 20,

Defendants enjoined.

1870, and July 10, 1873. It is further ordered that the intervention of the State be dismissed with costs, and the demand of the intervenor, The City of New Orleans, be rejected with costs of its intervention. It is further ordered that the defendant pay costs of both courts."

State intervention dismissed.

50-13 No. 157.

An act to authorize the consolidation of business or manufacturing corporations or companies.

SECTION 1. *Be it enacted by the senate and house of representatives of the State of Louisiana, in General Assembly convened,* That any two business and manufacturing corporations or companies now existing under general or special law, whose objects and business are in general of the same nature, may amalgamate, unite and consolidate said corporations or companies, and form one consolidated company, holding and enjoying all the rights, privileges, powers, franchises and property, belonging to each, and under such corporate name as they may adopt or agree upon. Such consolidation shall be made by agreement in writing, by or under the authority of the board of directors, and the assent of the owners of at least three-fifths of the capital stock of each of said corporations or companies; and a certificate of the fact of such consolidation, with the name of the consolidated company, shall be filed and recorded in the office of the secretary of state; *Provided,* No such consolidation shall in any manner affect or impair the right of any creditors of either of said companies. In the agreement of consolidation the number of directors of the consolidated company shall be specified, and the capital stock may be any amount agreed upon by the companies or corporations, and set forth in the articles of consolidation.

SECTION 2. *Be it further enacted, etc.,* That all laws or parts of laws conflicting in any manner with the provisions of this act, be and the same are hereby repealed, and that this act shall take effect from and after its passage.

CHAS. W. LOWELL,
Speaker of the House of Representatives.
C. C. ANTOINE,
Lieutenant-Governor and President of the Senate.

Approved December, 12, 1874.

WM. P. KELLOGG,
Governor of the State of Louisiana.

50–14 *Articles of Consolidation.*

An agreement to consolidate "The New Orleans Gas Light Company" and "The Crescent City Gas Light Company" into one company under the name of "The New Orleans Gas Light Company," by virtue of act No. 157, of the General Assembly of the State of Louisiana, approved December 12, 1874.

The president and board of directors of "The New Orlears Gas Light Company," and the president and board of directors of "The Crescent City Gas Light Company," availing themselves of the provisions of an act of the General Assembly, No. 157, approved December 12, 1874, entitled "An act to authorize the consolidation of business or manufacturing corporations or companies," do hereby, on this 29th day of March, in the year 1875, enter into the following agreement of union, amalgamation and consolidation, which is to become final and binding whenever the same shall receive the assent of the owners of three-fifths of the capital stock of each of said corporations.

Agreement to consolidate.

Name of consolidated company.

ARTICLE 1. The objects and business of the two companies being of the same nature, the amalgamating companies shall form one consolidated company, under the name and style of "The New Orleans Gas Light Company."

Capital stock $10,000,000.

$3,750,000 paid up.

ART. 2. The capital stock of the consolidated company is hereby fixed at ten million dollars, ($10,000,000), of which the sum of three millions seven hundred and fifty thousand dollars, ($3,750,000,) represented by thirty-seven thousand five hundred (37,500) shares, of one hundred dollars ($100) each, is to be considered as, and is hereby declared to be full paid, at the ratification of this agreement; and the residue of six millions, two hundred and fifty thousand dollars, ($6,250,000), may be issued in such sums, and at such times as the board of directors may deem proper, from any accumulated earnings invested in works or plant during the operations of the consolidated company; such issues of stock to be distributed *pro rata* among the stockholders of the consolidated company.

Directors may issue the residue *pro rata* from time to time.

50–15 ART. 3. The entire number of shares of stock issued to this date by the New Or-

leans Gas Light Company is nineteen thousand eight hundred, (19,800), of one hundred dollars ($100) each; and the owners of said shares are entitled under this agreement to two millions five hundred thousand dollars, ($2,500,000) of the full paid stock of the consolidated company; that is to say, twenty-five thousand (25,000) shares are to be distributed *pro rata* among the owners of said nineteen thousand eight hundred (19,800) shares in the manner following: The certificates of stock now held by the owners of said nineteen thousand eight hundred (19,800) shares are hereby accepted, adopted and recognized and considered as certificates of stock issued by the consolidated company, representing nineteen thousand eight hundred shares (19,800) of the twenty-five thousand (25,000) shares allotted under this agreement to the stockholders of the New Orleans Gas Light Company, and the residue of said twenty-five thousand (25,000) shares of stock of the consolidated company, to-wit: five thousand two hundred shares (5,200) are to be issued in new certificates, and delivered to the owners of said nineteen thousand eight hundred (19,800) shares of the New Orleans Gas Light Company, *pro rata* to each stockholder, in proportion to the amount of stock held by him.

Stockholders of old company entitled to 25,000 shares of consolidated stock.

Old certificates of stock recognized as certificates of consolidated company.

New certificates for 5,200 shares to be issued *pro rata*.

ART. 4. The entire stock of the Crescent City Gas Light Company issued at this date is three million dollars, ($3,000,000) represented by thirty thousand (30,000) shares of one hundred dollars ($100) each. All certificates for stock issued by the said Crescent City Gas Light Company are hereby annulled and cancelled, and considered as of no legal effect, or in any manner binding on the consolidated company, to which company the said cancelled certificates, together with the archives and rights and property of said Crescent City Gas Light Company are to be transferred and conveyed and surrendered upon the ratification of this agreement; and in lieu thereof, there shall be issued to Henry Y. Attrill, as
50–16 representative of all the stockholders of the Crescent City Gas Light Company, and at their request, certificates for twelve thousand five hundred (12,500) shares of full paid stock of the consolidated company, amounting in the aggregate to one million two hundred and fifty thousand dollars, ($1,250,000); the same being the

All certificates of stock issued by Crescent City Company annulled and cancelled.

Cancelled certificates, archives and property of Crescent City Co. to be surrendered to consolidated Co.

New certificates for 12,500 shares in consolidated company to be issued to H. Y. Attrill representing stockholders of Crescent City Company.

proportional part of the three million seven hundred and fifty thousand dollars ($3,750,000) of full paid stock assigned and allotted under this agreement to the stockholders of the Crescent City Gas Light Company.

Dividend in July, 1875, payable only upon old stock of N. O. Gas Light Company.

ART. 5. A dividend of six per cent. is to be made on July 1, 1875, payable only to the stockholders holding the certificates for said nineteen thousand eight hundred (19,800) shares of stock heretofore issued by the New Orleans Gas Light Company; and on January 1, 1876, a dividend of six per cent. is to be made among all the stockholders of the consolidated company, from the actual nett profits realized between July 1st and December 31, 1875, together with any excess of profits remaining from the operations of the first half year, after paying the dividend above mentioned of July 1, 1875, to the nineteen thousand eight hundred (19,800) shares of the New Orleans Gas Light Company; and thereafter, regular semi-annual dividends are to be paid in January and July of each year, of six per cent. or more, in this city, or in the city of New York, (in such manner as may be prescribed by the by-laws of the company,) at the option of the stockholder; *Provided*, That no dividend shall in any event, exceed in amount the actual nett profits of the company, after deducting therefrom a proper provision for depreciation, maintenance, extensions and contingencies; and in case the nett earnings do not afford a dividend of six per cent. the dividend shall be made of the amount actually earned; but extra dividends may be made from time to time, if earned.

Dividend in January, 1876, and thereafter, payable upon the whole consolidated stock.

Dividends to be 6 per cent. or more semi-annually in January and July.

Payable in N. O. or N. York.

Dividends not to exceed nett profits.

Extra dividends.

Directors.

ART. 6. The board of directors of the consolidated compano shall consist of seven members, four of whom shall constitute a quorum; and the regular elections of directors shall take place at the time specified, and in the manner provided in section 1, of the act of July 10, 1873, amending the charter of the Crescent City Gas Light Company; each share of stock represented by the owner or his proxy being entitled to one vote, and the holder of ten shares shall be eligible as a director. Until the next regular election, said board shall consist of the following named stockholders, viz: James Jackson, B. Biscoe, Charles Macready, John Geddes,

50–17

Elections for directors.

Each share entitled to one vote.

James W. Burbridge, Duncan F. Kenner, and Henry Y. Attrill.

The board of directors shall have power to make and prescribe such by-laws, rules and regulations as shall appear to them needful and proper; and shall appoint as many officers and clerks and assistants as may be necessary for carrying on the business and affairs of the company, allowing them such salaries as they may see fit; and shall have the general management, control and administration of the property and affairs of the consolidated company.

Directors to make by-laws.

Employ clerks, etc.

Fix salaries.

ART. 7. The stockholders of the present New Orleans Gas Light Company, are entitled to whatever accumulated surplus said company may possess on April 1, 1875, to be distributed *pro rata* among the holders of the nineteen thousand eight hundred (19,800) shares of stock of the present New Orleans Gas Light Company; and the right to dividends from said surplus shall be appurtenant to the said nineteen thousand eight hundred shares of stock.

Stockholders of old company entitled to surplus existing Ap'l 1, 1875.

ART. 8. The gas works, machinery, main pipes, service pipes, meters, lamps erected, and all other property actually in use for the business of gas manufacture and distribution on April 1, 1875, including all real estate in New Orleans, (except the building No. 159 Common street,) belonging to the New Orleans Gas Light Company, as well as all the franchises, powers, privileges and property of the Crescent City Gas Light Company, especially the exclusive privilege of making and vending gas lights in the city of New Orleans for fifty years, from April 1, 1875, granted to the Crescent City Gas Light Company by act approved April 20, 1870, and confirmed by act approved July 10, 1873, are hereby transferred to and vested in the consolidated company, which is authorized to use the property aforesaid, and operate under the charter of the said Crescent City Gas Light Company. But this transfer is not intended to include the surplus of the New Orleans Gas Light Company mentioned in article 7, of this agreement, which said surplus consists of the building No. 159 Common street, all stocks, bonds, mortgages and other evidences of debt from the city of New Orleans and private parties and companies, over and above cash liabilities on April 1st, 1875, also surplus stocks of

Property transferred to consolidated company.

Exclusive privilege transferred to consolidated company.

50–18

Surplus of old company defined.

coke, shells, new retorts, gas pipes, meters and other materials purchased in anticipation of future needs, on hand April 1, 1875, except coal; the stock of coal then on hand being transferred to the consolidated company as an offset against all amounts for which the New Orleans Gas Light Company is liable to consumers of gas as deposits for security of bills; which liability is hereby assumed by the consolidated company.

Stock of coal on hand to offsett deposits for gas.

ART. 9. The consolidated company shall supply with gas the charity hospital free of all expense until otherwise ordered by the board of directors; and gas shall be furnished to all orphan asylums situated on the lines of mains of the company at the price of two dollars ($2 00) per 1000 cubic feet, unless otherwise ordered by the directors.

Charity hospital.

Orphan asylums.

ART. 10. The consolidated company shall not charge more than four dollars ($4 00) per 1000 cubic feet of gas, except in case of war or blockade. The price of gas is, for the present, fixed at four dollars ($4) per 1000 cubic feet, subject to change by the board of directors; and the directors may, from time to time, fix a rate of discount for prompt payment of bills, as they may deem proper. The rate of discount is, for the present, established at fifty cents per 1000 cubic feet, upon gas consumed through meters from and after May 1st, 1875.

Price of gas.

Discount for prompt payment.

ART. 11. The officers, clerks and servants of the present New Orleans Gas Light Company shall become, *ipso facto*, the officers, clerks and servants of the consolidated company; and they are hereby confirmed in their respective positions and salaries and terms of office, as hitherto established, their terms of service in behalf of the present New Orleans Gas Light Company being recognized and considered as if spent in the service of the consolidated company. The consolidated company may provide for the retirement on a pension equivalent to half-pay of all its faithful officers, clerks and servants, when they shall have been in its service or that of the present company, or both, for the full term of twenty years; or proportionately for a shorter period, when they shall become superannuated or incapacitated for duty from accident or disease, while in the service of the company.

50–19

Officers, clerks, etc., of the old company retained.

Provision for pensions.

ART. 12. That all the right, title and interest

of the present New Orleans Gas Light Company in the property included in the surplus mentioned in article 7, and described in article 8, is hereby vested in the consolidated company as trustee for the stockholders of the present New Orleans Gas Light Company, to be administered and disposed of by the board of directors of the consolidated company for the benefit of the holders of the aforesaid nineteen thousand eight hundred (19,800) shares of the stock of the present New Orleans Gas Light Company; and said property which is susceptible of division in kind, shall be at once divided in kind, except the real estate and materials on hand, and mortgage notes and claims. The real estate is to be sold on reasonable terms; and the mortgage notes and claims to be collected and proceeds divided as collected. The said board of directors shall have power to adjust, settle and compromise claims and mortgage notes; the materials on hand may be disposed of to the consolidated company or otherwise as the board of directors may determine.

Surplus to be administered by directors of consolidated company.

Division in kind.

Real estate.

Mortgage notes.

Materials.

ART. 13. The board of directors of the consolidated company are authorized to carry out the details of this consolidation and to regulate all matters for this purpose, not specially provided for in this agreement.

Directors to carry out details of consolidation.

50-20 In testimony whereof, James Jackson, president, and B. Biscoe, Charles Macready, John Geddes, and James W. Burbridge, directors of the New Orleans Gas Light Company;

And Henry Y. Attrill, president, and Charles Gibson, Thomas L. Wibray, and J. M. Conway, directors of the Crescent City Gas Light Company, have hereunto set their respective names, on the day and year above written, and the seals of said respective companies are hereto affixed.

JAMES JACKSON, *President.*
B. BISCOE.
CHAS. MACREADY.
JOHN GEDDES.
J. W. BURBRIDGE.

[N. O. Gas Light Company Seal.]

HY. Y. ATTRILL,
Pres. C. C. G. L. Co.
C. GIBSON.
THOS. L. WIBRAY.
J. M. CONWAY.

[Crescent City Gas Light Co. Seal.]

Ratification of the Agreement of Consolidation by the Stockholders of the New Orleans Gas Light Company.

Office of New Orleans Gas Light Company, corner of Common and Baronne streets.

Be it remembered, that on this day, to-wit: Friday, the ninth day of April, 1875,

At a general meeting of the stockholders of this, the New Orleans Gas Light Company, convened pursuant to a resolution of the board of directors of said company, due notice of which was given by advertisement published in the daily papers of this city for ten days previous to the present date, for the purpose of deliberating whether they would or would not assent to and ratify certain articles of consolidation agreed upon by and between the president and directors of this, the New Orleans Gas Light Company of the one part, and the president and directors of the Crescent City Gas Light Company of the other part, entered into under the provisions of an act of the General Assembly of Louisiana, approved December 12, 1874, No. 157, entitled "An act to authorize the consolidation of business or manufacturing corporations or companies," James Jackson was called to the chair and Theobald Forstall appointed secretary.

50–21

The said agreement of consolidation, the original text of which is of record, on pages 435 to 439 of the record book of this company, having been read to the meeting, the chairman submitted the following resolution of the board of directors, adopted April 7, 1875:

Resolved, That articles of consolidation agreed upon between the president and directors of the New Orleans Gas Light Company, and the president and directors of the Crescent City Gas Light Company, under the provisions of act No. 157, approved December 12, 1874, be and are hereby presented to the regular meeting of stockholders to be held on April 9, 1875, with the recommendation of the preliminary meeting held on April 6th, for their assent and ratification.

The following resolutions were then offered, seconded and adopted:

Resolved, That this meeting do approve and assent to the agreement of consolidation just read, as engrossed in the record book of this company.

Resolved, further, That each stockholder attach his signature to these resolutions, as recorded in the record book of the company, with the number of shares owned or represented by him.

[Signed by stockholders representing 14,359 shares of the company's stock.]

And the said stockholders, representing fourteen thousand three hundred and fifty-nine shares of the capital stock of the company, being more than three-fifths of the same, and no stockholder having

voted in the negative, it is thereupon declared that by the will of the stockholders, so as aforesaid expressed, the said agreement of consolidation is assented to and ratified; and it is thereupon
50–22 therefore ordered that an original copy of these proceedings be transmitted to the secretary of state to be by him deposited in the archives of his office, to the end that in conformity with the provisions of the act of the General Assembly, No. 157, aforesaid due and public notice be given of the ratification of the said agreement by stockholders representing more than three-fifths in value of the capital stock of said company.

Adjourned.

JAMES JACKSON, *Chairman.*

Attest: THEOB'D FORSTALL, *Secretary.*

Ratification by the Stockholders of the Crescent City Gas Light Company.

Stockholders' meeting.

Office Crescent City Gas Light Company, No. 50 Camp street.

APRIL 9, 1875—6 o'clock p. m.

The meeting called for 10 o'clock, this a. m., having been adjourned until this hour, on account of the absence of Mr. H. Y. Attrill, (holding a large majority of the stock) was called to order by the appointment of T. L. Wibray as chairman, and J. M. Conway, as secretary, all the stockholders being present.

Mr. H. Y. Attrill reported as follows to the meeting: That the board of directors of this company had effected an amalgamation with the New Orleans Gas Light Company, under the provisions of act 157, 1874: and that the agreement was now presented to the stockholders for their assent and ratification.

After having been read and considered: on motion, the action of the board of directors was approved and the agreement for amalgamation was ratified and assented to; thirty thousand shares voted aye, against, none.

The president was authorized to do all things necessary to carry out and perfect said agreement, and all matters arising out of the same, said agreement being the same as hereinbefore copied.

On motion, the meeting then adjourned.

THOS. L. WIBRAY, *Chairman.*

J. M. CONWAY, *Secretary.*

50–23 & 24 *Certificate of the Secretary of State.*

State of Louisiana, office of secretary of state.

NEW ORLEANS, *April* 12, 1875.

I hereby certify that the above and foregoing is a true copy of the "agreement of consolidation" between the New Orleans Gas Light Company, and the Crescent City Gas Light Company, with proceedings of the general meetings of the stockholders of the New Orleans Gas Light Company and the Crescent City Gas Light Company, held April 9, 1875, to ratify said agreement, filed in this office on the 10th day of this month.

Given under my hand and the seal of the State, this [SEAL.] twelfth day of April, A. D. 1875, and of the Independence of the United States the ninety-ninth.

P. G. DESLONDE,
Secretary of State.

50–25 *By-Laws of the New Orleans Gas Light Company, Adopted by the Board of Directors at their Meeting, November 16th, 1875.*

CHAPTER I.

Of Meetings of the Stockholders.

Annual meeting.

SECTION 1. A meeting of the stockholders shall be held annually on the second * Tuesday in January, between the hours of 10 a. m. and 2 p. m., at the office of the company, for the election of seven directors to serve during the ensuing year, and until their successors shall have been elected and qualified.

Ten days' notice to be given.

Postponement.

SEC. 2. Due notice of said meeting shall be given by advertisement for ten days, in two daily newspapers of the city of New Orleans; and if for any reason, the said election should not take place on the day fixed therefor, the meeting for this purpose shall be held on another day not more than ten days thereafter.

Special meetings may be called.

Object must be stated in the call.

SEC. 3. Special meetings of the stockholders may be called by the board of directors, when necessary, of which ten days' notice shall also be given in two daily newspapers. The object of every such special meeting shall be clearly expressed in said notice; and no subject shall be considered at the meeting thus called, other than that stated in said notice.

* Act No. 106, section 1, § 2.

50-26

CHAPTER II.

Of Election for Directors.

SECTION 1. The annual election for directors shall be held under the superintendence of three commissioners, stockholders of the company, appointed by the outgoing board of directors, outside of their own body, at their regular meeting in December preceding the election. Written notice of their appointment shall be sent to the commissioners; and in case any of them shall neglect or refuse to serve, the president shall, in writing, appoint another in his place.

Three commissioners to be appointed.

President may fill a vacancy.

SEC. 2. The stock transfer books shall be closed one week before the election, and the secretary shall make up, for the use of the commissioners, a correct list of all the stockholders, and of the number of shares held by each of them.

Secretary to prepare a stock list.

SEC. 3. * The election shall be by ballot; each share of stock represented by the owner or his proxy shall be entitled to one vote; and the holder of ten shares, in his own name, is eligible as a director. Upon each ballot presented, the commissioners shall mark plainly in ink, the number of shares to which the voter is entitled, as set down in the stock list furnished by the secretary; and they shall deposit the same in a box previously emptied and sealed by them.

Every share entitled to one vote.

Owner of ten shares eligible as director.

Ballot-box to be sealed.

SEC. 4. The voting shall cease at 2 o'clock, p. m., and the commissioners shall immediately count the ballots. The seven persons voted for, who being eligible, shall have received the greatest number of votes, shall be declared elected directors for the ensuing year; and the commissioners shall draw up in writing, duplicate certificates of said election over their signatures; stating the names of all candidates voted for, the number of votes received by each, and the total number of votes cast.

Candidates elected.

Duplicate certificates.

SEC. 5. The result of said election shall be published for one week in two daily newspapers of this city, and the secretary shall notify, in writing, each of the directors elect of his said

50-27 election, and of the time and place when and where they shall meet together to organize themselves into a board.

Result of election to be published.

Notice to directors elect.

* Act No. 106, section 1; agreement of consolidation, art. 6.

CHAPTER III.

Of the Board of Directors.

Functions of the board.

SECTION 1. The general management, control and administration of the property and affairs of the company is vested in the board of directors,* and shall be exercised at the office of the company, in the city of New Orleans.

Quorum.

SEC. 2. There shall be seven directors, four of whom shall constitute a quorum for the transaction of business.†

Statement of affairs.

SEC. 3. On the second Tuesday in January, of each year, at the annual meeting for the election of directors, the outgoing board of directors shall lay before the stockholders a statement of all the affairs and concerns of the company for their information.‡

Certificate of election to be recorded.

SEC. 4. On the third Tuesday in January after said election, the outgoing board of directors shall hold their last regular meeting, and the secretary shall read to the board the certificate of election of the directors elect, which shall be entered in the journal of said meeting.

Annual election of officers.

SEC. 5. On the first Monday in February, the directors elect shall assemble at 12 o'clock, m., and organize by the election of a president and vice president from their own body, and a secretary and treasurer either members or not of their own body.§

Committee to examine accounts.

SEC. 6. The president shall, as soon as said organization is effected, appoint a committee of three directors, who shall examine the books and accounts of the company, and verify the cash and other assets. Said committee shall report, in writing, at the next regular meeting of the board, or sooner at a special meeting, if necessary, the result of their examination, and said report shall be recorded in the journal.

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Regular meetings.

SEC. 7. The board of directors shall hold their regular meeting on the third Tuesday of every month, except when this day shall be a holiday; in which case the meeting shall take place on the following day. A journal of pro-

*Agreement of consolidation, art. 6.
†Agreement of consolidation, art. 6.
‡Act No. 97, section 7.
§Act No. 106, section 1, § 1.

ceedings at all meetings shall be kept by the secretary, or in his absence, by the treasurer.

SEC. 8. Special meetings of the board may be called at any time by the president, or, in his absence, by the vice president, whenever the interests of the company may require them. Special meetings.

SEC. 9. All meetings of the board shall be governed as far as possible by the rules of "Jefferson's Manual;" and at every stated meeting the following order of business shall be observed: Order of business.

1st. Reading and approving the minutes of former proceedings.

2d. Reports of general superintendent and officers.

3d. Reports of committees.

4th. Election to fill vacancies.

5th. Unfinished business.

6th. New business.

SEC. 10. If any director shall cease to be a stockholder, his office shall become vacant*; and when any vacancy shall occur in the board, by death, resignation or otherwise, the remaining directors shall, at the first ensuing regular meeting, elect a director from among the qualified stockholders, to fill the vacancy for the unexpired term. Vacancies. How filled.

SEC. 11. The board of directors shall declare semi-annual dividends† at their regular meetings in June and December, of the nett earned profits of each half year, in *in* accordance with article 5 of the agreement of consolidation. Semi-annual dividends.

50-29 CHAPTER IV.

Of the Officers of the Company.

SECTION. 1. The officers of the company are declared to be: Officers of the company.

A president,
A vice president,
A general superintendent,
A secretary,
A treasurer,
A manager of the works,
An auditor of the works.

SEC. 2. The president, vice president, treasurer and secretary shall be elected annually by the Elective officers.

*Act No. 97, section 5.
†Act No. 97, section 7.

board of directors, as hereinbefore provided in chapter III, § 5.

Other officers—how appointed.

SEC. 3. All other officers shall be appointed by the board, as vacancies occur, and shall hold their office during good behavior; but no officer shall be dismissed or appointed except by the affirmative vote of a majority of the whole number of directors.

Bonds and sureties.

SEC. 4. All officers and employees handling cash belonging to the company, shall give such bonds for the faithful performance of their duties, as the board of directors may determine. But no director, or officer, or employee of the company shall be received as surety upon any bond so given.

Officers not to contract debts.

SEC. 5. No debt or liability, beyond the necessary, legitimate business and current expenses of the company, shall be contracted by the president or any other officer, without the consent of the board of directors, previously obtained at a regular meeting.

No officers to be interested pecuniarily in any transaction for the company.

SEC. 6. Neither the president nor any other officer or employee of the company shall be pecuniarily interested, directly or indirectly, in any supplies or materials purchased by the company; nor shall they receive any brokerage, commissions, discounts or perquisites of any kind, on account of contracts or purchases made in its behalf.

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CHAPTER V.

Of the President and Vice President.

To preside at all meetings.

SECTION 1. The president shall preside at all meetings of the board of directors, and shall be "*ex officio*" a member of all its committees.

Sign all instruments and contracts.

SEC. 2. He shall sign all certificates of stock, contracts, instruments or papers in writing, to which the seal of the company is required to be affixed; and he shall countersign all checks, warrants, notes or drafts drawn by the treasurer, and all bills, vouchers and pay rolls.

Make all purchases.

SEC. 3. He shall make or approve all purchases which are required for the company, and shall exercise a general supervision over the business of the company, and the conduct of its officers and employees.

Suspend officers.

SEC. 4. He shall suspend from duty any officer for neglect, incompetency, insubordination or in-

temperance, and shall report such suspension to the board at its next regular meeting, for final action.

SEC. 5. The vice president in the absence or during inability of the president, from illness or other cause, shall have the same powers and fulfil the same duties as the president.

Duties of the vice president.

CHAPTER VI.

Of the General Superintendent.

SECTION 1. The general superintendent shall be the executive officer of the company, under the direction of the president, and shall exercise a daily supervision and control over every department of the company's business.

The executive officer.

SEC. 2. He shall have his office at the office of the company, and shall visit the works daily.

SEC. 3. He shall attend all meetings of the board of directors, and make regular monthly reports of the operations of the company.

He shall attend all meetings.

SEC. 4. He shall inform himself by correspondence, experiment or otherwise, of the value of all new processes in the manufacture, purification or distribution of gas, the results of which information he shall from time to time communicate to the board.

Seek improvements in manufacture.

50-31 SEC. 5. He shall examine all requisitions for materials or supplies, and all pay rolls, bills and vouchers; and affix to each of them his approval in writing, before they are submitted to the president.

Examine and approve all vouchers, etc.

SEC. 6. He shall keep a daily journal, open to the inspection of the directors, in which he shall enter abstracts or memoranda of important matters, contracts, agreements, etc.

Keep a diary.

SEC. 7. At the annual meeting of the board, on the first Monday in February, he shall lay before the directors a full report of the operations of the company during the year ending December 31st, with a statement of the condition of the works, and an estimate of income, expenditure and profits for the ensuing year, and such recommendations as he may think necessary. He shall also prepare statements of the operations of each half-year, which shall be submitted to the board at their regular meetings in June and December.

Make annual reports.

Semi-annual statements.

CHAPTER VII.

Of the Secretary.

Journal of proceedings.

SECTION 1. The secretary shall attend all meetings of the board of directors, and keep the journal of their proceedings. He shall issue all notices of meetings of the board and of the stockholders.

List of officers and salaries.

SEC. 2. He shall prepare and lay before the board, annually, at their first meeting in February, a list of all the officers, clerks and employees paid by the year, with their respective salaries.

Keep the books.

SEC. 3. He shall keep the general books of the company, and the stock and transfer books, and shall be the custodian of the corporate seal of the company.

Audit accounts.

SEC. 4. He shall countersign all certificates of stock, audit all accounts which do not come within the scope of the auditor of the works, and certify to their correctness.

Verify cash returns.

SEC. 5. He shall audit all returns made by the collectors and cash clerks, and verify the accounts of the treasurer.

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SEC. 6. He shall keep a register of employees in which shall be entered the name, residence, rate of wages, occupation, date of employment and discharge, and the standing of every workman and laborer employed by the company.

Balance sheets.

SEC. 7. He shall make up monthly a trial balance sheet of the ledger; a statement of profits, and an exhibit of unpaid bills in each collector's district.

Records.

SEC. 8. He shall keep records of the daily and monthly station reports, with such other statistical tables as may be from time to time prescribed by the general superintendent.

Annual balance and statements.

SEC. 9. He shall close and balance the general books annually on the first of January, and make up a statement of the income, expenditure, and profits of the year, together with a detailed inventory of all the property, assets and liabilities of the company.

CHAPTER VIII.

Of the Treasurer.

Receive and disburse all funds.

SECTION 1. The treasurer shall receive and disburse all moneys for account of the company, and have charge of its valuable papers and securities

Daily deposits.

SEC. 2. He shall deposit daily in such chartered bank or banks as the board of directors may select, all moneys received by him for account of the company.

Payment by bank check.

SEC. 3. He shall make all payments (except when the amount is less than ten dollars,) by bank checks, which shall be countersigned by the president.

Petty bills.

SEC. 4. He shall pay in cash all bills less than ten dollars in amount, and every such payment shall be entered in detail in a petty-bill book.

Receipts.

SEC. 5. He shall take a receipt in writing in the receipt book of the company, for each and every payment made by him.

To pay none but certified vouchers.

SEC. 6. He shall pay no bills, invoices, pay-rolls or any other claims against the company, until they shall have been duly certified by the auditor of the works, or by the secretary, according to the nature of the claim, and approved by the president and general superintendent.

Daily cash abstract book.

50–33 SEC. 7. He shall keep an abstract book in which shall be daily entered an account of all receipts and disbursements, in order that the exact cash balance on hand may be daily ascertained.

Monthly statements.

SEC. 8. He shall make up, on the first of every month, a classified statement of receipts and disbursements, which shall be recorded in the balance book of the company.

CHAPTER IX.

Of the Manager of the Works.

Manufacture etc., of gas.

SECTION 1. The manager shall have charge of the manufacture, purification and delivery of the gas from the gas holders. He shall employ and control the labor necessary to operate the works, subject to the regulations hereinafter provided, and shall be responsible to the general superintendent for the proper fulfilment of his duties.

SEC. 2. He shall reside at the works; and remain upon the premises during the day, and occasionally during the night shift, so as to enforce constant efficiency in every department under his care.

SEC. 3. He shall confer daily with the general superintendent upon all matters connected with the station, and shall make monthly reports, in

writing, of the condition of the works; and a general report, annually on the 1st of January, of his operations, with such suggestions as may seem proper to be made.

CHAPTER X.

Of the Auditor of the Works.

Keep station book.

SECTION 1. The auditor shall keep the books and records of the station, and make up the weekly pay-rolls of the men employed at the works and in the streets.

Register of workmen.

SEC. 2. He shall keep a register in which shall be entered the names, residence, occupation, rate of wages and standing of every workman employed at the station and in the streets, with the date of his employment and discharge; and no workman shall be included in any pay-roll, until his name shall have been reported to the auditor for entry in said register. All changes, whether by addition or discharge, in the number of men employed, shall be reported day by day to the secretary.

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All changes to be reported to the secretary.

Pay rolls.

SEC. 3. He shall, in person, receive from the treasurer the sum required for wages according to the pay-roll, and pay to each workman in person, or to his proper representative, the amount entered to his credit.

Daily reports.

SEC. 4. He shall keep daily accounts of the consumption of coal, lime, etc.; the production and consumption of gas and deliveries of coke, a report of which shall be made to the secretary.

Monthly reports.

SEC. 5. He shall keep detailed accounts of all materials and supplies received and used at the station and in the streets, a monthly report of which shall be made to the secretary; and annually, on the 1st of January, he shall prepare a detailed inventory of all materials and supplies remaining on hand from actual inspection, and of all tools and implements in the hands of the several foremen.

Annual inventory.

Requisition for materials.

SEC. 6. He shall make requisition in writing to the general superintendent for all materials and supplies required for the works; and no purchase shall be made in the name of the company until the requisition for the same shall have been approved by the general superintendent.

SEC. 7. He shall have charge of all materials

and supplies in stock, and shall make no deliveries of same except upon a written requisition from the manager, or other proper officer, and said requisition shall be dated and numbered, and entered in a book for convenient reference. Deliveries of materials.

SEC. 8. He shall audit and certify all bills, invoices and accounts relating to the station, before transmitting them for approval to the general superintendent. Audit of accounts.

SEC. 9. He shall make no deliveries of coke, tar, or other products from the works, except upon an order issued from the office of the company; and no cash transactions of any kind shall be made at the station, except the payment of wages above provided for. Deliveries of coke, etc.

50-35 CHAPTER XI.

Of the Other Employees of the Company.

SECTION 1. In addition to the officers mentioned in chapter IV, section 1, the regular employees shall be as follows:

(*a*.) In the financial department:
One deposit clerk.
One application clerk.
One cash clerk.
One coke clerk.
One bill clerk.
One assistant clerk.
Five collectors.

(*b*.) In the gas-distributing department:
One inspector of mains, services and fittings.
One inspector of meters.

SEC. 2. These employees shall be appointed by the president with the consent of the board of directors, and shall hold their office during good behavior; but may be summarily discharged by the president for neglect, insubordination, intemperance or general inefficiency. Tenure of office.

SEC. 3. The duties of said employees shall be prescribed by the general superintendent, in a Code of Rules to be approved by the president, and printed for the use of employees; subject, however, to revision and amendment from time to time as the exigencies of business may require. Duties of employees.

SEC. 4. Any officer or employee of the company, handling its funds, who shall embezzle or wrong- Embezzlement

fully appropriate any said funds, shall be prosecuted in a criminal suit.

Office hours.

SEC. 5. The office hours of the company for business with the public shall be from 9 a. m. to 3 p. m., and from 5 to 7 p. m., except upon legal holidays, when the office shall be closed at 12 o'clock, m. All officers and employees, however, shall devote such additional time as may be necessary to the completion of the daily business; and all books shall be regularly posted day by day.

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CHAPTER XII.

Of Salaries and Pensions.

SECTION 1. The salaries of all officers and employees shall be fixed by the board of directors, and shall be subject to revision, annually, at the first meeting in February.

SEC. 2. All salaries and pensions shall be paid by the treasurer, on the last day of every month; and no officer or employee, paid by the month, shall draw any portion of his current salary before the regular date of payment.

CHAPTER XIII.

Of Dividends.

SECTION 1. All dividends shall be payable January 15th, and July 15th, at the office of the company in the city of New Orleans, or with current exchange, at such bank in the city of New York as the board of directors shall appoint, and it shall be optional with any stockholder to receive his dividends at either place.

SEC. 2. All stockholders electing to receive their dividends in the city of New York, shall notify the secretary of the company, in writing, of such decision, not less than thirty days before the date of payment of the next dividend; and shall register their names, with the number of shares of stock held by them, and the date and number of their certificate at the bank aforesaid, in the city of New York; and each stockholder, whenever presenting himself, in person or by an attorney, to receive a dividend, shall exhibit the said certificate of stock, and otherwise identify himself to the satisfaction of said bank.

SEC. 3. Any stockholder, registered in New York, who shall neglect to claim and receive a dividend within six months after the regular date of payment, shall lose his option of receiving said unclaimed dividend in New York, and must thereafter receive payment of same, at the office of the company, in New Orleans.

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CHAPTER XIV.

Of Transfers of Stock.

SECTION 1. All blank certificates of stock of the company, shall be bound in a book and numbered, and each certificate shall have a margin which shall remain in said book when the certificate is issued, and on which shall be entered by the secretary, (1) the number and date of each certificate issued; (2) the name of the person to whom; (3) the number of shares for which it is issued, and (4) the page in the stock ledger where posted; and a receipt for said certificate, which shall be signed by the person to whom it is issued when he or she receives it.

SEC. 2. All certificates of stock shall be signed by the president and countersigned by the secretary, and shall have the seal of the company impressed upon them.

SEC. 3. No transfer of stock shall be made, unless the certificate therefor previously issued shall have been surrendered to the company, with the word "Cancelled" written across its face, and signed and dated by the person surrendering the same; and no transfer of stock shall be valid unless made upon the books of the company by the person owning said stock, or by his, her or their legally constituted attorney, or in case of death, by their legal representatives.

SEC. 4. All powers of attorney, or probate powers to transfer stock, must be filed with the secretary, either in the original or in the form of a certified copy.

SEC. 5. No new certificate of stock shall be issued in the place of any certificate claimed to be lost or destroyed, unless proof shall be made by affidavit, and a notice of such loss or destruction shall have been published for six weeks in one of the daily newspapers of the city of New Orleans, requiring all persons to show cause why a new certificate should not be issued; and unless a bond, satisfactory to the president, shall be given to indemnify the company against all loss or damage by reason of the issue of a new certificate.

SEC. 6. Every certificate of stock issued in place of one alleged to be lost or destroyed, shall bear the same date and number as the one originally issued, and have legibly written across its face, that it is issued in the place of a certificate of the same date and number, which is alleged to be lost or destroyed.

50-38

CHAPTER XV.

Of By-Laws, Rules, and Regulations.

SECTION 1. The foregoing by-laws are established for the government of the company, as provided in the charter and articles of consolidation,* and all officers and employees are expected to comply with them.

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*Act No. 97, section 7. Agreement of consolidation, art. 6.

SEC. 2. They may be amended or modified by the board of directors; but any amendment or alteration must be proposed at a regular meeting, to be acted upon finally at the next regular meeting, and shall be adopted only upon the affirmative vote of the majority of all the directors.

SEC. 3. The general superintendent shall establish a system of rules and regulations to be approved by the board of directors, defining the practice of the company in its relations with gas-fitters and consumers, with regard to extensions of mains, service pipes, meter-setting, and the inspection of meters and fittings.

51 *Decision of Supreme Court of the United States, Offered in Evidence by Plaintiff.*

Filed January 30, 1901.

51½ Acts April 1, 1835, page 92.
Act No. 100—1845, p. 45, p. 59.
Act No. 105. Acts 1864. Page 66.

Decision of the United States Supreme Court.

THE NEW ORLEANS GAS-LIGHT COMPANY, Appellant, *vs.* THE LOUISIANA LIGHT AND HEAT PRODUCING AND MANUFACTURING COMPANY *et al.* | No. 18. October Term, 1885. Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

51–1 Supreme Court of the United States, October Term, 1885.

THE NEW ORLEANS GAS-LIGHT COMPANY, Appellant, *vs.* THE LOUISIANA LIGHT AND HEAT PRODUCING AND MANUFACTURING COMPANY *et al.* | No. 18. Appeal from the Circuit Court of the United States for the Eastern District of Louisiana,

1. The New Orleans Gas-Light Company, a corporation of Louisiana, formed by the union of a corporation of the same name with the Crescent City Gas Light Company, has, by its charter, the exclusive privilege of supplying gas to the city and people of New Orleans, by means of pipes, mains, and conduits laid, at its own cost, in the streets and other public ways of that city.

2. Before the adoption of the present constitution of that State, the legislature had authority to grant to a private corporation an exclusive privilege of that character, and such grant constitutes a contract, the obligation of which cannot be impaired by a State law.

3. The manufacture and distribution of gas by means of pipes, mains, and conduits, placed, under legislative authority, in the public ways of a municipality, is not an ordinary business, in which every one may engage, as of common right, upon terms of equality; but is a franchise relating to matters of which the public may assume control, and, when not forbidden by the organic law of the State, may be granted by the legislature, as a means of accomplishing public objects, to whomsoever, and upon what terms, it pleases.

4. The grant of the exclusive privilege in question is none the less a contract, because the manufacture and distribution of gas, when not subjected to proper supervision, may work injury to the public; for, such a grant does not restrict the power of the State to establish and enforce regulations, not inconsistent with the essential rights given to the company by its charter, which may be necessary for the protection of the public against injury, whether aris-
51-2 ing from the want of due care in the conduct of the business, or from an improper use of streets in laying gas-pipes, or from the failure of the grantee to furnish gas of the required quality and amount.

5. The constitutional prohibition upon State laws, impairing the obligation of contracts, does not restrict the power of the State to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts.

6. The provision in the present constitution of Louisiana abrogating the monopoly features of existing corporations, other than railroad corporations, is inoperative in respect of the charter of the New Orleans Gas-Light Company. The State can no more impair the obligation of a contract by her organic law than by legislative enactment; and the obligation of her contracts are as fully protected by the national constitution against impairment by legislation as are contracts between individuals exclusively.

[December 7th, 1885.]

Mr. Justice HARLAN delivered the opinion of the court:

The Louisiana Light and Heat Producing and Manufacturing Company, a corporation of Louisiana, was organized in the year 1881, by H. S. Jackson, W. Van Benthusen, and their associates, under a general law providing for the formation of corporations for certain purposes, among which are the construction and maintenance of works for supplying cities or towns with gas. These associates and their successors, transferees, and assigns, had previously been authorized, by an ordinance of the common council of New Orleans, passed January 25, 1881, for the period of fifty years, and upon specified conditions, to lay mains, pipes, and conduits in the streets, alleys, sidewalks, bridges, avenues, parks, gardens, and other places in that city, for the purpose of supplying the public with gas. Among the conditions was one to the effect that the rights and

privileges defined in the ordinance were granted and accepted without liability upon the part of the city to any other gas company to which franchises had been granted by legislative enactment. The consideration to be paid for these privileges was the sum of $20,000.

The benefit of this municipal grant having been transferred to the Louisiana Light and Heat Producing and Manufacturing Company,
and that corporation being about to proceed with the
51–3 construction of its mains, pipes, and conduits, the present
suit was commenced against it and its directors in the civil district court of the parish of New Orleans, by the New Orleans Gas-Light Company which had been created, as will be presently explained, by the consolidation of other corporations. The plaintiff claims to be entitled for the term of fifty years from April 1, 1875, to the sole and exclusive privilege of manufacturing and distributing gas in that city by means of pipes, mains and conduits laid in its streets, to such persons or corporate bodies as may choose to contract for the same. The relief asked is a decree perpetually enjoining defendant from digging up the streets, and other public ways or places of the city for the purpose of laying pipes, conduits, or mains for supplying illuminating gas, and from asserting any right to do so until after the lapse of fifty years from the latter date.

An application for an injunction having been denied, the suit was thereafter removed by the plaintiff into the circuit court of the United States, upon the ground that it was one arising under the Constitution of the United States. In the latter court a bill was filed, so as to conform to the general rules of equity practice.

A statement of the history of the corporations concerned in the before-mentioned consolidation is necessary to a clear understanding as well of the grounds upon which the court below proceeded, as of the questions argued in this court.

By an act of the legislature of Louisiana, passed April 1, 1835, the New Orleans Gas-Light and Banking Company was incorporated and was given "the sole and exclusive privilege of vending gas-lights in the city of New Orleans and its faubourgs and the city of Lafayette, to such persons or bodies corporate who may voluntarily choose to contract for the same;" to which end it was authorized to lay pipes or conduits at its own expense in any of the public ways or streets of those localities, having due regard to the public convenience. The right was reserved to the city, after the expiration of forty years, to buy such gas works as the company constructed and pay for the same in city bonds. If the city declined to purchase, then its bonds which the company had received in payment of its subscription of stock were to be renewed for twenty years.

By amendments of its charter made in 1845 and 1854, the
51–4 company's right to engage in banking was, by its consent,
withdrawn, and the remaining rights granted by the original act were continued to the corporation under the name of the New Orleans Gas-Light Company, to be enjoyed until April 1, 1875, when

its corporate privileges were to expire. This change was made subject to the condition that the company should assume all the debts and engagements of the original company, release its claims against the Charity hospital, and, during the continuance of its charter, furnish that institution with necessary gas and fixtures free of charge. By amendments made in 1860 its charter was extended to April 1st, 1895, the exclusive privileges granted by the original charter not, however, to exist beyond the time fixed in the act of incorporation.

By an act approved April 20th, 1870, another company, under the name of the Crescent City Gas-Light Company, was incorporated. The charter provided that that company, its successors and assigns, should, for fifty years from the expiration of the charter of the New Orleans Gas-Light Company, have the sole and exclusive privilege of making and supplying gas-lights in the city of New Orleans, by means of pipes or conduits laid in the streets, to such persons or bodies corporate as might voluntarily choose to contract for it. By a subsequent enactment, in 1873, it was given authority to issue bonds to an amount not exceeding $1,000,000, secured by mortgage of its works and property; and it was declared that the charter of the New Orleans Gas-Light Company should expire on April 1, 1875, from which latter date, and for the term fixed in the act of 1870, the franchise and privileges granted to the Crescent City Gas-Light Company were confirmed.

By a judgment rendered February 1, 1875, in a suit brought by the Crescent City Gas-Light Company against the New Orleans Gas-Light Company, and which involved their respective rights to manufacture and sell gas in New Orleans, the supreme court of the State held that the former company "has the sole and exclusive privilege to make and sell illuminating gas in the city of New Orleans, for fifty years from 1st April, 1875;" also, that the act of March 1, 1860, extending the charter of the New Orleans Gas-Light Company from April 1, 1875, until April 1, 1895, "is unconstitutional and void," as having a title that did not declare the object of the act. The latter company was also enjoined from conducting business after April 1, 1875, while the other company was confirmed in its exclusive right, after that date, to manufacture and distribute gas in New Orleans. Crescent City Gas-Light Co. *v.* New Orleans Gas-Light Co., 27 La. Ann. 138.

51–5

The bill sets out the foregoing facts, and alleges that during February and March, 1875, the directors of the two companies, by means of conferences with each other and with their respective stockholders, concluded to consolidate the two corporations under the name of the New Orleans Gas-Light Company, which should hold and enjoy the rights, privileges, franchises, and property of each; that they determined the amount of its capital, the number of directors, and the persons to compose a board before an election; that the two boards made an agreement, in writing, to which the owners of all the stock of either company have assented; that there has been no

contestation by any stockholder of either of the two corporations of the consolidation or consolidation agreement; that "there was a formal vote, comprising more than three-fifths of all owners of stock, ratifying and confirming the articles, and the agreement and certificate of consolidation have been filed and recorded in the office of the secretary of state;" that "the corporation thus organized and conducting business, from the 29th of March, 1875, has manufactured and sold gas throughout New Orleans without question or opposition," supplying the city, its officers, the officers of the State, and the public generally, and collecting its monthly bills; that there has been no suit by the State or the city questioning its capacity as a corporation, or its title to all the franchises, privileges, rights, or property in its possession; that its possession of "the sole and exclusive right aforesaid has existed from the agreement of the 29th of March, 1875;" that the State regularly assessed the property of the corporation and its franchise for taxation, and compelled it by suit to pay such taxes on property amounting to $3,750,000, of which the franchise is charged to be worth $1,250,000; and that the city of New Orleans, in like manner, assessed the consolidated company, and required from it the performance of the obligations of its charter in supplying gas throughout the city and on the public streets and in public buildings ever since the before-mentioned consolidation.

51–6 The defendants filed a demurrer and plea to the bill. The case was determined upon the demurrer, which was sustained and the bill dismissed, without any mention being made of the plea.

The circuit court was of opinion that the consolidation was entirely without legal authority, and, consequently, that there is, in law, no such corporation as the one which instituted this suit. Upon that ground alone the bill was dismissed.

The effect of the consolidation of March 29, 1875, is the first question to be considered.

By an act of the General Assembly of Louisiana of December 12, 1874, and entitled "An act to authorize the consolidation of business or manufacturing corporations or companies," it is provided: "That any two business and manufacturing corporations or companies now existing under general or special law, whose objects and business are in general of the same nature, may amalgamate, unite, and consolidate said corporations or companies, and form one consolidated company, holding and enjoying all the rights, privileges, powers, franchises, and property belonging to each, and under such corporate name as they may adopt or agree upon. Such consolidation shall be made by agreement in writing, by or under the authority of the board of directors, and the assent of the owners of at least three-fifths of the capital stock of each of said corporations or companies, and a certificate of the fact of such consolidation, with the name of the consolidated company, shall be filed and recorded in the office of the secretary of state: *Provided*, No such consolida-

tion shall in any manner affect or impair the right of any creditors of either of said companies. In the agreement of consolidation the number of directors of the consolidated company shall be specified, and the capital stock may be any amount agreed upon by the companies or corporations, and set forth in the articles of consolidation."

It will be observed that a consolidated company formed under this act acquires all the rights, privileges, and franchises possessed by its constituent companies.

It is contended—and such was the view taken by the circuit court—that, as the original New Orleans Gas-Light Company had until April 1, 1875, the exclusive right to manufacture and
51-7 distribute gas in New Orleans, and as the like exclusive right of the Crescent City Gas-Light Company did not come into existence until that day, the latter company was not when the act of 1874 was passed an "existing" business or manufacturing corporation entitled to the privilege of consolidating with another company.

In this interpretation of the statute we do not concur. The original and amended charters of the Crescent City Gas-Light Company invested it with powers of an important character capable of being effectively exerted prior to the passage of the general statute of 1874. By the act of April 20, 1870, it was authorized, after its passage, to lay pipes or conduits in any of the streets or alleys of the city of New Orleans. Upon its organization, it was entitled to acquire and hold property for all the objects of its creation, to construct works, purchase machinery, provide materials, and make such preparations as were required to put it in readiness to enjoy the exclusive privilege of supplying the city and its inhabitants with gas on and after April 1, 1875. After its incorporation it could have made contracts, obtained capital, and raised money upon bonds secured by mortgage of its works and property then or thereafter acquired. At the passage of the consolidation act it was entitled to exert the powers given by its charter, except that it could not, before April 1, 1875, encroach upon the exclusive privileges granted to the other company. With the consent of the latter company, it could even prior to that date have manufactured and sold gas to the city and to its inhabitants; for, as declared in the Civil Code of Louisiana, (art. 11) "in all cases in which it is not expressly or impliedly prohibited, they [individuals] can renounce what the law has established in their favor, when the renunciation does not affect the rights of others, and is not contrary to the public good." Without such consent, the Crescent City Gas-Light Company could after its organization have engaged in the manufacture and distribution of gas in those parts or districts of New Orleans not included in the charter of the old company. Pontchartrain R. R. Co. *v.* Lafayette & P. R. R. Co., 10 La. Ann. 742. For these reasons, we are of opinion that, on the passage of the act of 1874, and, within a reasonable interpretation of its language, the Crescent City Gas-Light Company was an "existing" business or manufacturing corpora-

tion, entitled to "amalgamate, unite, and consolidate" with
51–8 any like corporation having objects and business in general of the same nature. In so holding, it is not perceived that violence is done to any considerations of public policy which could be supposed to have prompted the act of 1874, or the legislation relating to the two companies.

These views give effect to the decision of the supreme court of the State in Fee *v.* The New Orleans Gas-Light Company, 35 La. Ann. 413, which was determined after the decree in the circuit court had been passed. One of the questions related to Fee's rights in the consolidated company by virtue of his ownership of stock in the Crescent City Gas-Light Company. The report of that case shows that the articles of consolidation were before the court, and that their legal effect was considered with reference to the provisions of the act of 1874. Mr. Justice Fenner, speaking for the court, said: "On the 29th of March, 1875, the New Orleans Gas-Light Company and the Crescent City Gas-Light Company, two corporations chartered under the laws of this State, amalgamated, united, and consolidated themselves into one consolidated company, in pursuance of the provisions of an act of the General Assembly, No. 157 of 1875, entitled 'An act to authorize the consolidation of business or manufacturing corporations or companies.' * * * All requirements of the act were fully complied with. * * * The articles of consolidation, and the legislative act by the authority of which they were executed, evidently present a case of complete and perfect amalgamation, the effect of which was, under American authorities, to terminate the existence of the original corporations, to create a new corporation, to transmute the members of the former into members of the latter, and to operate a transfer of the property, rights, and liability of each old company to the new one. * * * These authorities, and the reason of the matter, satisfy us that plaintiff can and must look to the defendant company for the satisfaction of whatever rights he had against the Crescent City Gas-Light Company, in the mode and on the terms provided in the articles of consolidation." Again: "The law conferred upon three-fifths of his fellow stockholders the power to effect a consolidation without his consent, and even against his will, and he is bound by that consolidation, and by the legal effects thereof, which we have heretofore stated." If the view taken by the circuit court be correct,
51–9 then the consolidation between these companies could not, as adjudged by the supreme court of Louisiana, have affected Fee's rights, and compelled him to look to the consolidated company for the satisfaction of his claims as a stockholder in the Crescent City Gas-Light Company.

This brings us to the consideration of questions more difficult. It is further contended that the right granted to the Crescent City Gas-Light Company, of manufacturing and distributing illuminating gas, and now enjoyed by the consolidated company, was abrogated to the extent that it was made exclusive by that article of

the constitution of Louisiana of 1879 which, while preserving rights, claims and contracts then existing, provided that "the monopoly features in the charter of any corporation now existing in this State, save such as may be contained in the charter of railroad companies, are hereby abolished;" and, that such article is not in violation of the provision of the Constitution of the United States which forbids a State to pass a law impairing the obligation of contracts.

These propositions have received the careful consideration which their importance demands.

It is true, as suggested in argument, that the manufacture and distribution of illuminating gas, by means of pipes or conduits placed, under legislative authority, in the streets of a town or city, is a business of public character. Under proper management the business contributes very materially to the public convenience, while, in the absence of efficient supervision, it may disturb the comfort and endanger the health and property of the community. It also holds important relations to the public through the facilities furnished, by the lighting of streets with gas, for the detection and prevention of crime. An English historian, contrasting the London of his day with the London of the time when its streets, supplied only with oil lamps, were scenes of nightly robberies, says that "the adventurers in gas-lights did more for the prevention of crime than the government had done since the days of Alfred." Knight, vol. 7, ch. 21; Macaulay, ch. 3.

Municipal corporations constitute a part of the civil government of the State, and their streets are highways which it is the province of the government by appropriate means to render safe. To that end the lighting of streets is a matter of which the public
51-10 may assume control. For these reasons, and the necessity of uniform regulations for the manufacture and distribution of gas for use by the community, we are of opinion that the supplying of it to the city of New Orleans, and to its inhabitants, by the means designated in the legislation of Louisiana, was an object for which the State could rightfully make provision. Authority for the position that the supplying of gas to a city and its people may become a public purpose is found in New Orleans *v.* Clark, 95 U. S. 652. That case involved the liability of a municipal corporation upon coupon bonds issued to a company which had undertaken, for a valuable consideration, to light its streets with gas. Mr. Justice Field, delivering the opinion of the court, said: "A private corporation, as well as individuals, may be employed by a city in the construction of works needed for the health, comfort, and convenience of its citizens; and though such works may be used by the corporation for its own gain, yet, as they advance the public good, the corporation may be properly aided in their construction by the city; and for that purpose its obligations may be issued, unless some constitutional or legislative provision stands in the way." Legislation of that character is not liable to the objection that it is a mere monopoly, preventing citizens from engaging in an ordinary pursuit or business open as of common

right to all, upon terms of equality; for, the right to dig up the streets and other public ways of New Orleans, and place therein pipes and mains for the distribution of gas for public and private use, is a franchise, the privilege of exercising which could only be granted by the State, or by the municipal government of that city acting under legislative authority. Dillon's Munic. Corp., 3d edit. § 691; *State v.* Cincinnati Gas Co., 18 Ohio St. 262. See also Boston *v.* Richardson, 13 Allen, 146.

To the same effect is the decision of the supreme court of Louisiana, in Crescent City Gas-Light Co. *v.* N. O. Gas-Light Co., 27 An. 147, in which it was said: "The right to operate gas-works and to illuminate a city, is not an ancient or usual occupation of citizens generally. No one has a right to dig up the streets, and lay down gas pipes, erect lamp-posts, and carry on the business of lighting the streets and the houses of the city of New Orleans, without special authority from the sovereign. It is a franchise belonging to the State,
51-11 and, in the exercise of the police power, the State could carry on the business itself or select one or several agents to do so."

It will therefore be assumed, in the further consideration of this case, that the charter of the Crescent City Gas-Light Company—to whose rights and franchises the present plaintiff has succeeded—so far as it created a corporation with authority to manufacture gas and to distribute the same by means of pipes, mains, and conduits, laid in the streets and other public ways of New Orleans, constituted, to use the language of this court in the case of the Delaware Railroad tax, 18 Wall. 206, "a contract between the State and its corporators, and within the provision of the Constitution prohibiting legislation impairing the obligation of contracts," and therefore "equally protected from legislative interference, whether the public be interested in the exercise of its franchise, or the charter be granted for the sole benefit of its corporators." See also Greenwood *v.* Freight Co., 105 U. S. 20; New Jersey *v.* Yard, 95 *id.* 113.

But it is earnestly insisted that, since the supplying of New Orleans and its inhabitants with gas has relation to the public comfort, and, in some sense, to the public health and the public safety, and, for that reason, is an object to which the police power extends, it was not competent for one legislature to limit or restrict the power of a subsequent legislature, in respect to those subjects. It is, consequently, claimed that the State may at pleasure recall the grant of exclusive privileges to the plaintiff; and that no agreement by her, upon whatever consideration, in reference to a matter connected in any degree with the public comfort, the public health or the public safety, will constitute a contract the obligation of which is protected against impairment by the National Constitution. And this position is supposed by counsel to be justified by recent adjudications of this court in which the nature and scope of the police power have been considered.

In the Slaughter-house cases, 16 Wall. 62, it was said that the

police power is, from its nature, incapable of any exact definition or limitation; and in Stone *v.* Mississippi, 101 U. S. 818, that it is "easier to determine whether particular cases come within the general scope of the power than to give an abstract definition of the power itself, which will be in all respects accurate." That
51-12 there is a power, sometimes called the police power, which has never been surrendered by the States, in virtue of which they may, within certain limits, control everything within their respective territories, and upon the proper exercise of which, under some circumstances, may depend the public health, the public morals, or the public safety, is conceded in all the cases. Gibbons *v.* Ogden, 9 Wh. 203. In its broadest sense, as sometimes defined, it includes all legislation and almost every function of civil government. Barbier *v.* Connolly, 113 U. S. 31. As thus defined, we may, not improperly, refer to that power the authority of the State to create educational and charitable institutions, and provide for the establishment, maintenance and control of public highways, turnpike roads, canals, wharves, ferries, and telegraph lines, and the draining of swamps. Definitions of the police power must, however, be taken subject to the condition that the State cannot, in its exercise, for any purpose whatever, encroach upon the powers of the General Government, or rights granted or secured by the supreme law of the land.

Illustrations of interference with the rightful authority of the General Government by State legislation—which was defended upon the ground that it was enacted under the police power—are found in cases where enactments concerning the introduction of foreign paupers, convicts, and diseased persons, were held to be unconstitutional as conflicting, by their necessary operation and effect, with the paramount authority of Congress to regulate commerce with foreign nations, and among the several States. In Henderson, &c., *v.* Mayor of New York, 92 U. S. 263, the court, speaking by Mr. Justice Miller, while declining to decide whether in the absence of congressional action the States can, or how far they may, by appropriate legislation, protect themselves against actual paupers, vagrants, criminals, and diseased persons, arriving from foreign countries, said, that no definition of the police power, and "no urgency for its use can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution." Chy Lung *v.* Freeman, 92 U. S., 276. And in Railroad Co. *v.* Husen, 95 U. S., 474, Mr. Justice Strong, delivering the opinion of the court, said that "the police power of a State cannot obstruct foreign commerce or inter-state commerce
51-13 beyond the necessity for its exercise; and, under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution."

That the police power, according to its largest definition, is restricted in its exercise by the National Constitution, is further shown by those cases in which grants of exclusive privileges respecting public highways and bridges over navigable streams, have been

sustained as contracts the obligations of which are fully protected against impairment by State enactment*s*.

In Bridge Proprietors *v.* The Hoboken Co., 1 Wall. 116, it was decided that a statute of New Jersey empowering certain commissioners to contract for the building of a bridge over the Hackensack river, and providing not only that the "said contract should be valid on the parties contracting as well as on the State of New Jersey," but that it should not be lawful "for any other person or persons whatsoever to erect any other bridge over or across the said river for ninety-nine years," was a contract whose obligation could not be impaired by a law of the State. Mr. Justice Miller, delivering the opinion of the court, after observing that the parties who built the bridge had the positive enactment of the legislature in the very statute which authorized the contract with them, that no other bridge should be built, and that the prohibition against the erection of other bridges was the necessary and only means of securing to them the benefit of their grant, said: "Without this they would not have invested their money in building the bridges, which were then much needed, and which could not have been built without some such security for a permanent and sufficient return for the capital so expended. On the faith of this enactment they invested the money necessary to erect the bridges. These acts and promises, on the one side and the other, are wanting in no element necessary to constitute a contract."

In the Binghamton Bridge, 3 Wall. 51, the question was, whether a charter granted to a company authorizing it to build and maintain a bridge across a river in New York for the accommodation of the public, in consideration for which it was given a right to take certain tolls, and providing that it should be unlawful for anyone to erect a bridge, or establish a ferry, within a distance of
51–14 two miles on that river, either above or below that bridge, constituted a contract within the meaning of the Constitution. Under authority of a subsequent statute, another company erected a bridge across the same river, within a few rods above the old one, to the injury of the business of the latter. The argument was strenuously pressed that, while the legislature could dispose of all matters properly the subject of bargain, it had no authority to dispose of the right of passing a great river for four miles. The court held that the first company's charter was a contract between it and the State, within the protection of the Constitution of the United States, and that the charter to the last company was, therefore, null and void. Mr. Justice Davis, delivering the opinion of the court, said, that, if anything was settled by an unbroken chain of decisions in the Federal courts, it was, that an act of incorporation was a contract between the State and the stockholders, "a departure from which now would involve dangers to society that cannot be for-seen, would shock the sense of justice of the country, unhinge its business interests, and weaken, if not destroy, that respect which has always been felt for the judicial department of the Government." It was also observed, in language applicable to the present case, in some respects: "The

purposes to be attained are generally beyond the ability of individual enterprise, and can only be accomplished through the aid of associated wealth. This will not be risked unless privileges are given and securities furnished in an act of incorporation. The wants of the public are often so imperative that a duty is imposed on the Government to provide for them; and, as experience has proved that a State should not directly attempt to do this, it is necessary to confer on others the faculty of doing what the sovereign power is unwilling to undertake. The legislature, therefore, says to public-spirited citizens: 'If you will embark, with your time, money, and skill, in an enterprise which will accommodate the public necessities, we will grant to you, for a limited period, or in perpetuity, privileges that will justify the expenditure of your money, and the employment of your time and skill.' Such a grant is a contract, with mutual considerations, and justice and good policy alike require that the protection of the law should be assured to it." See also West River Bridge Co. *v.* Dix, 6 How. 531.

51-15 The same principle was declared by the supreme court of Louisiana in Pontchartrain R. R. Co. *v.* Orleans Navigation Co., 15 La. 413, where Chief Justice Martin said: "In the same manner as Congress may reward the discoverer of a new invention or mode of constructing roads, by an exclusive privilege, the legislature may reward those who employ their capital and industry in doubtful enterprises, for the construction of a railway between two points, which may be of great utility to the public, though the success of the enterprise may be precarious." See also Pontchartrain R. R. Co. *v.* N. O. R. Co., 11 An. 253; Pontchartrain R. R. Co. *v.* Lafayette & P. R. R. Co., *ubi supra*. And in Crescent City Gas-Light Co. *v.* N. O. Gas-Light Co., the court said: "As the legislature had the right in 1835 to grant the sole and exclusive privilege to the defendant company to make and vend gas in New Orleans for forty years, the legislature of 1870 had the same power to confer on the plaintiff the same privilege for fifty years from the termination of the grant to defendant. We, therefore, conclude that the grant of the monopoly complained of does not violate the Constitution and is valid."

Numerous other cases could be cited as establishing the doctrine that the State may by contract restrict the exercise of some of its most important powers. We particularly refer to those in which it is held that an exemption from taxation, for a valuable consideration at the time advanced, or for services to be thereafter performed, constitutes a contract within the meaning of the Constitution. Asylum *v.* New Orleans, 105 U. S. 368; Home of the Friendless, 8 Wall. 430; New Jersey *v.* Wilson, 7 Cranch, 166; Bank of Ohio *v.* Knopp, 16 How. 376; Gordon *v.* Appeal Tax Court, 3 How. 133; Wilmington R. R. *v.* Reid, 13 Wall. 266; Humphrey *v.* Pegues, 16 *ib.* 248-9; Farrington *v.* Tennessee, 95 U. S. 689.

If the State can, by contract, restrict the exercise of her power to construct and maintain highways, bridges, and ferries, by granting to a particular corporation the exclusive right to construct and oper-

ate a railroad within certain lines and between given points, or to maintain a bridge or operate a ferry over one of her navigable streams within designated limits; if she may restrict the exercise of the power of taxation, by granting exemption from taxation
51–16 to particular individuals and corporations; it is difficult to perceive upon what ground we can deny her authority—when not forbidden by her own organic law—in consideration of money to be expended and important services to be rendered for the promotion of the public comfort, the public health, or the public safety, to grant a franchise, to be exercised exclusively by those who thus do for the public what the State might undertake to perform either herself or by subordinate municipal agencies.

The former adjudications of this court, upon which counsel mainly rely, do not declare any different doctrine, or justify the conclusion for which the defendant contends.

In Beer Co. *v.* Massachusetts, 97 U. S. 32, one of the questions considered was, whether the charter of a private corporation, authorizing it to engage in the manufacture of malt liquors, and, as incidental thereto, to dispose of the product, constituted a contract protected against subsequent legislation prohibiting the manufacture of liquors within the State. The Beer Company claimed the right, under its charter, to manufacture and sell beer without limit as to time, and without reference to any exigencies in the health or morals of the community requiring such manufacture to cease. It was decided that, while the company acquired by its charter the capacity, as a corporation, to engage in the manufacture of malt liquors, its business was at all times subject to the same governmental control as like business conducted by individuals; and that the legislature could not divest itself of the power, by such appropriate means, applicable alike to corporations and individuals, as its discretion might devise, to protect the lives, health, and property of the people, or to preserve good order and the public morals. The prohibitory enactment of which the Beer Company complained was held to be a mere police regulation which the State could establish even had there been no reservation of authority to amend or repeal its charter.

The case of Fertilizing Co. *v.* Hyde Park, 97 U. S. 663, is much relied on by counsel. But a careful examination will show that it does not militate against the views here expressed. A fertilizing company, having been authorized by its charter to establish and maintain south of a specified line in Cook county, Illinois, chemical and other works for manufacturing and converting animal matter into an agricultural fertilizer and other chemical
51–17 products, claimed that its charter constituted a contract the obligation of which was impaired by an ordinance of the village of Hyde Park, where its works were established, prohibiting under penalties the carrying of offal through its streets from Chicago to the company's place of business. The ordinance was based upon a statute passed after the date of the company's charter, investing

the village authorities with power to define or abate nuisances injurious to the public health, and to regulate, prohibit, or license certain named trades or callings, and "all establishments and places where nauseous, offensive, or unwholesome business was carried on." It appeared in proof that the company's factory was "an unendurable nuisance to the inhabitants for many miles around its location; that the stench was intolerable, producing nausea, discomfort, if not sickness to the people; that it depreciated the value of the property, and was a source of immense annoyance;" and that the transportation of putrid animal matter by the company through the streets of Hyde Park "was offensive in a high degree both to sight and smell." The decision was, that the State, under her power to protect the public health, could abate the nuisance created by the company's business, notwithstanding its works had been established within the general locality designated in its charter; and, consequently, the legislature could, at its discretion, amend the charter of Hyde Park and remove the restriction upon its authority to abate nuisances, or invest it with power to regulate or prohibit business necessarily injurious to the public health.

The same principles underlie the decision in Stone *v.* Mississippi, 101 U. S. 814, in which it was held that any one accepting a grant of a lottery does so "with the implied understanding that the people, in their sovereign capacity and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not," the only right acquired by the grantee being "a suspension of certain governmental rights in his favor, subject to withdrawal at will." The business, for the protection of which the contract clause of the Constitution was invoked, was declared by the court to be a species of gambling, wrong in its influence, and tending to "disturb the checks and bal-
51–18 ances of a well-ordered community." Touching legislation granting the privilege of engaging in business of that character, the Chief Justice, delivering the opinion of the court, said: "No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing, in its nature; they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power."

We are referred to Butchers' Union Co. *v.* Crescent City Co., 111 U. S. 746, as authority for the proposition that the State is incapable of making a contract protected by the National Constitution, in reference to any matter within the reach of her police power in its broadest sense. But no such principle is there established. In that case the question was whether a grant in 1869 to a private corporation of the exclusive privilege of maintaining a live-stock landing

and slaughter-house, within a certain part of the territory of Louisiana, embracing the city of New Orleans—all slaughtering by others in that city to be done at the establishment erected by that corporation—prevented the State, or the municipal government of the city, acting under her authority, from thereafter opening to general competition the right to maintain slaughter-houses and live-stock landings. The majority of the court, in the Slaughter-house cases, having determined that the grant was merely a police regulation, designed to remove from the thickly populated part of New Orleans "noxious slaughter-houses and large and offensive collections of animals necessarily incident to the slaughtering business of a large city," and that the authority to do that rested upon the same ground as the power to interdict in the midst of dense populations unwholesome trades, operations offensive to the senses, building with combustible materials, and the burial of the dead, it was ruled in the last case that the obligations of a contract could not arise out of such a police regulation. So far from the court saying that the State could not make a valid contract in reference to any matter whatever within the reach of the police power, according to its largest
51–19 definition, its language was: "While we are not prepared to say that the legislature can make valid contracts on no subject embraced in the largest definition of the police power, we think that, in regard to two subjects so embraced, it cannot, by contract, limit the exercise of those powers to the prejudice of the general welfare. They are the *public health* and the *public morals*. The preservation of these is so necessary to the best interests of social organization, that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime." In that case, four members of this court, while assenting to the doctrine that the State cannot limit the exercise of its powers to the prejudice of the public health and the public morals, concurred in the judgment upon the general ground, among others, that the act of 1869, giving exclusive privileges to the company, the validity of whose charter, in that respect, was the matter determined in the Slaughter-house cases, was not, in any just or legal sense, an exercise of the police power for the preservation of the public health, but, under the pretence simply of exerting that power, was an invasion of the right of citizens, other than those interested in that particular company, to engage in an ordinary business, open to every one upon terms of perfect equality, although, at all times, it was subject to such regulations in respect of the locality and the mode in which it should be conducted as the State might establish.

The principle upon which the decisions in Beer Co. *v.* Massachusetts, Fertilizing Co. *v.* Hyde Parke, Stone *v.* Mississippi, and Butchers' Union Co. *v.* Crescent City Live-Stock Landing Co., rests, is, that one legislature cannot so limit the discretion of its successors, that they may not enact such laws as are necessary to protect the public health or the public morals. That principle, it may be observed,

was announced with reference to particular kinds of private business which, in whatever manner conducted, were detrimental to the public health or the public morals. It is fairly the result of those cases, that statutory authority, given by the State under her police power, to corporations or individuals to engage in a particular private business attended by such results, while it protects them
51-20 for the time against public prosecution, does not constitute a contract preventing the withdrawal of such authority, or the granting of it to others.

The present case involves no such considerations. For, as we have seen, the manufacture of gas, and its distribution for public and private use by means of pipes laid, under legislative authority, in the streets and ways of a city, is not an ordinary business in which every one may engage, but is a franchise belonging to the Government, to be granted, for the accomplishment of public objects, to whomsoever, and upon what terms, it pleases. It is a business of a public nature, and meets a public necessity for which the State may make provision. It is one which, so far from affecting the public injuriously, has become one of the most important agencies of civilization for the promotion of the public convenience and the public safety.

It is to be presumed that the legislature of Louisiana, when granting the exclusive privileges in question, deemed it unwise to burden the public with the cost of erecting and maintaining gas-works sufficient to meet the necessities of the municipal government and the people of New Orleans, and that the public would be best protected, as well as best served, through a single corporation invested with the power and charged with the duty, of supplying gas of the requisite quality and in such quantity as the public needs demanded. In order to accomplish what, in its judgment, the public welfare required, the legislature deemed it necessary that some inducement be offered to private capitalists to undertake, at their own cost, the work of supplying gas for the city and its people. That inducement was furnished in the grant of an exclusive privilege of manufacturing and distributing gas by means of pipes laid in the streets of New Orleans for a fixed period, during which the company would be protected against competition from corporations or companies engaged in like business. Without that grant it was inevitable either that the cost of supplying the city and its people would have been made, in some form, a charge upon the public, or the public would have been deprived of the security in person, property, and business which comes from well-lighted streets.

It is not our province to declare that the legislature unwisely exercised the discretion with which it was invested. Nor are
51-21 we prepared to hold that the State was incapable—her authority in the premises not being, at the time, limited by her own organic law—of providing for supplying gas to one of her municipalities and its inhabitants, by means of a valid contract with a private corporation of her own creation. We may repeat here what

was said by Chief Justice Taney in Ohio Life Insurance and Trust Co. *v.* Debolt, 16 How. 428, in reference to the authority of a State to limit the exercise of its power of taxation: "But whether such contracts should be made or not is exclusively for the consideration of the State. It is the exercise of an undoubted power of sovereignty which has not been surrendered by the adoption of the Constitution of the United States, and over which this court has no control. For it can never be maintained in any tribunal in this country that the people of a State, in the exercise of the powers of sovereignty, can be restrained within narrower limits than that fixed by the Constitution of the United States, upon the ground that they make contracts ruinous or injurious to themselves. The principle that they are the best judges of what is for their own interest is the foundation of our political institutions. It is equally clear, upon the same principle, that the people of a State may, by the form of government they adopt, confer on their public servants and representatives all the power and rights of sovereignty which they themselves possess; or may restrict them within such limits as they deem best and safest for the public interest." After observing that the power of the State to make contracts may be indiscreetly and, for the public, injuriously exercised, he proceeds: "Yet, if the contract was within the scope of the authority conferred by the constitution of the State, it is like any other contract made by competent authority, binding upon the parties. Nor can the people or their representatives, by any act of theirs afterwards, impair its obligation. When the contract is made the Constitution of the United States acts upon it and declares that it shall not be impaired, and makes it the duty of this court to carry it into execution. That duty must be performed."

With reference to the contract in this case, it may be said that it is not, in any legal sense, to the prejudice of the public health or the public safety. It is none the less a contract because the
51–22 manufacture and distribution of gas, when not subjected to proper supervision, may possibly work injury to the public; for, the grant of exclusive privileges to the plaintiff does not restrict the power of the State, or of the municipal government of New Orleans acting under authority for that purpose, to establish and enforce regulations, not inconsistent with the essential rights granted by plaintiff's charter, necessary for the protection of the public against injury, whether arising from the want of due care in the conduct of its business, or from an improper use of the streets in laying gas-pipes, or from the failure of the grantee to furnish gas of the required quality and amount. The constitutional prohibition upon State laws impairing the obligation of contracts does not restrict the power of the State, to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a State are subject to regulations for the protection of the public health, the public morals, and the public safety,

in the same sense, and to the same extent, as are all contracts and all property, whether owned by natural persons or corporations.

Whatever therefore in the manufacture or distribution of gas in the city of New Orleans proves to be injurious to the public health, the public comfort, or the public safety, may, notwithstanding the exclusive grant to plaintiff, be prohibited by legislation, or by municipal ordinance passed under legislative authority. It cannot be said with propriety, that to sustain that grant is to obstruct the State in the exercise of her power to provide for the public protection, health and safety. The article in the State constitution of 1879 in relation to monopolies is not, in any legal sense, an exercise of the police power for the preservation of the public health, or the promotion of the public safety; for, the exclusiveness of a grant has no relation whatever to the public health, or to the public safety. These considerations depend upon the nature of the business or duty to which the grant relates, and not at all upon the inquiry whether a franchise is exercised by one rather than by many. The monopoly clause only evinces a purpose to reverse the policy previously pursued of granting to private corporations franchises accompanied
51-23 by exclusive privileges, as a means of accomplishing public objects. That change of policy, although manifested by constitutional enactment, cannot affect contracts which, when entered into, were within the power of the State to make, and which, consequently, were protected against impairment, in respect of their obligation, by the Constitution of the United States. A State can no more impair the obligation of a contract by her organic law than by legislative enactment; for, her constitution is a law within the meaning of the contract clause of the National Constitution. Railroad Co. *v.* McClure, 10 Wall. 511; Ohio Life Ins. & T. Co. *v.* Debolt, 16 How. 429; Sedgewick's Stat. & Const. Law, 637. And the obligation of her contracts is as fully protected by that instrument against impairment by legislation as are contracts between individuals exclusively. New Jersey *v.* Wilson, 7 Cranch, 164; Providence Bank *v.* Billings, 4 Pet. 514; Green *v.* Biddle, 8 Wheat. 1; Woodruff *v.* Trapnall, 10 How. 190; Wolf *v.* New Orleans, 103 U. S. 358.

If, in the judgment of the State, the public interests will be best subserved by an abandonment of the policy of granting exclusive privileges to corporations, other than railroad companies, in consideration of services to be performed by them for the public, the way is open for the accomplishment of that result, with respect to corporations whose contracts with the State are unaffected by that change in her organic law. The rights and franchises which have become vested upon the faith of such contracts can be taken by the public, upon just compensation to the company, under the State's power of eminent domain. West River Bridge Co. *v.* Dix, *ubi supra*; Richmond, &c., R. R. Co. *v.* Louisa R. R. Co., 13 How., 71, 83; Boston Water Power Co. *v.* Boston & Worc. R. R., 23 Pick. 360, 393; Boston & Lowell R. R. Co. *v.* Salem & Lowell R. R. Co., 2 Gray, 1, 35. In

that way the plighted faith of the public will be kept with those who have made large investments upon the assurance by the State that the contract with them will be performed.

The demurrer to the bill of complaint should have been overruled. Upon its averments the complainant was entitled to a decree perpetually restraining the defendants, and each of them, their servants, agents and employees, from the manufacture and
51–24 distribution of gas in New Orleans, by means of pipes, mains and conduits laid in or along the streets and other public ways and places of that city.

The decree dismissing the bill is reversed, and the cause remanded for further proceedings in conformity with this opinion.

Reversed.

True copy.
Test:

JAMES H. McKENNEY,
Clerk U. S. Supreme Court.

52 *Extract from Minutes of Meeting of Drainage Commission, Offered in Evidence by Plaintiff.*

Filed January 29th, 1900.

Drainage Commission of New Orleans.

Regular meeting April 20th, 1899.

Mr. Spencer read a communication addressed to his firm by Mr. Buck, attorney of the New Orleans Gas Light Company, referring to the controversy pending between the said company and the commission, whereupon:

Mr. Morris offered the following preamble and resolution

Whereas in prosecution of the work contemplated by the commission claims for damages for injuries to property and life, or from other cause, may be made against the commission, and,

Whereas it might be prudent for the commission to set aside certain funds, out of which any judgment which may be obtained may be satisfied, be it

Resolved that there be set aside as a contingent fund, fifty thousand dollars in the present issue of bonds of the drainage commission, which bonds shall be replaced and substituted by an equal amount of any subsequent issue of bonds which may be issued in exchange of the present issue.

Mr. Flower seconding, the preamble and resolution were unanimously adopted.

A true extract from the minutes.

(Signed) A. SCHREIBER, *Secretary.*

(1–16–1901)

Ordinances Numbers 7170, 7350, 8327, 10991, *and* 11480, *Offered in Evidence by Defendant.*

Filed January 29th, 1900.

53 MAYORALTY OF NEW ORLEANS,
CITY HALL, *Feb.* 6, 1893.

No. 7170, council series.

Whereas, the drainage of the city of New Orleans is in an extraordinarily disastrous condition, and

Whereas, there is no uniform or general plan adopted for the drainage of the city, and

Whereas, large sums of money have been spent from time to time without any general system or plan of drainage being adopted, and

Whereas, were a general and comprehensive system adopted, such money as is spent from time to time on drainage could be spent in such manner as to further the completion of a complete system and

Whereas, there is no positive or correct data as to the topography of the city, and

Whereas, it is absolutely necessary, in order to formulate a thorough and comprehensive plan of drainage, for the engineers to have exact, precise and full information relative to the topography of the city, the conditions of the soil as to absorption, and all other data pertinent to the subject,

Be it ordained by the common council of the city of New Orleans, That by and with the approval of the board of liquidation, the sum of seventeen thousand, five hundred dollars ($17,500.00) from that portion of the surplus in the hands of said board, which, by section 10 of article 110 of the Acts of the Legislature of 1890, is dedicated for public improvements, be and is hereby appropriated for the making of a thorough and complete topographical survey of the city of New Orleans and to obtain all the necessary data requisite for the formulating of a complete plan of drainage.

Be it further ordained, etc., That, immediately the formation is obtained, the city engineer will prepare and submit to the
54 council of the city of New Orleans a complete and comprehensive plan with sufficient detail to enable the plan to be thoroughly understood, and in such form as to designate the manner in which the work can be executed by degrees as money may be appropriated from time to time for the purpose of drainage, so that such money as is spent will be towards the ultimate completion of the complete plan.

Be it further ordained etc., That the city engineer in conjunction with the mayor and chairman of the committee on water and drainage, shall have authority to call, if necessary, an advisory board of

expert engineers on drainage for the purpose of confirming by competent authority such plan as may be adopted.

Be it further ordained, etc., That the city engineer shall confer with the mayor as to the expenditures, and will report every two weeks to the council of the city of New Orleans of the progress of the work and expenses of same.

Adopted by the council of the city of New Orleans Jan. 31 1893.

DAN A. ROSE,
Clerk of Council.

Approved Feb'y 6, 1893.

JOHN FITZPATRICK. *Mayor.*

A true copy:

CLARK STEEN,
Secretary to the Mayor.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *March* 30, 1893.

No. 7350, council series.

Be it ordained by the common council of the city of New Orleans, That section 3 of ordinance No. 7170, adopted Feb. 6, 1893, be amended so as to read as follows: "Be it further ordained etc., that the mayor shall appoint three (3) competent engineers to form an advisory board of engineers, for the purpose of approving or disapproving of the plan proposed by the city engineer for the making of a topographical survey of the city of New Orleans and obtaining information necessary for the formulating of a plan of drainage, as also to thoroughly investigate and pass upon such plan of drainage as may be submitted to the city council for approval, the compensation of this board of expert engineers to be paid out of the fund provided for in this ordinance, which compensation is to be fixed by the mayor, the chairman of the water and drainage committee, and the chairman of the finance committee of the city council."

Adopted by the council for the city of New Orleans March 28th 1893.

DAN A. ROSE,
Clerk of Council.

Approved March 30, 1893.

JOHN FITZPATRICK, *Mayor.*

A true copy:

CLARK STEEN,
Secretary to the Mayor.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *Nov.* 24, 1893.

No. 8327, council series.

Whereas, this the common council of the city of New Orleans has pledged itself to do all in its power for the effective drainage of the city of New Orleans; and whereas the most available funds for this purpose, in which all, are so greatly interested, are deprived chiefly from the sale of franchises: Be it resolved that the sum of seven hundred thousand ($700,000) dollars derived from the sale of franchises of city railroads acquired by Henry Bier, be and the same is hereby created a sacred fund to be devoted exclusively and solely for drainage purposes. Be it further resolved, that the plans for the preliminary topographical survey, if the hereinafter advisory board should deem the same necessary as well as any plans or survey or plans of drainage offered by civil engineers or other parties, shall be submitted to the advisory board, to be
56 composed of Mr. H. B. Richardson, present chief State engineer, Major B. M. Harrod, Mr. Rudolphe Hering, Mr. R. M. Walmsley, Mr. J. C. Denis and Mr. Edward Fenner, for approval or recommendation by said board to the city council; provided that no plan of drainage shall be finally adopted by the said advisory board, unless it receives the approval of a majority of the aforesaid city council. In case of death of any member of the advisory board herein named the others members shall select another person to act with them Be it further resolved that the clerk of the council is hereby instructed to send a notice to the members of the aforesaid advisory board of the meeting of the committee on drainage, in order that said members may be advised and enabled to be present at said meeting.

Adopted by the council of the city of New Orleans November 21, 1893.

DAN A. ROSE,
Clerk of Council.

Approved March 30th, 1893.

JOHN FITZPATRICK, *Mayor.*

A true copy,

CLARK STEEN,
Secretary to the Mayor

MAYORALTY OF NEW ORLEANS,
CITY HALL, *July* 10, 1895.

No. 10991, council series.

An ordinance adopting a system of drainage for the city of New Orleans.

Whereas, the advisory board on drainage, after a thorough research and exhaustive labors, have formulated a plan of drainage of the entire area of the city of New Orleans for their approval therefore, be it ordained, that the plan of drainage as submitted by the advisory board be and the same is hereby approved and accepted and made the plan of drainage to be put in execution in the
57 city of New Orleans, with this exception, that the Broad Street canal and the provisions made therefor, in making it the main canal for the drainage system, be amended so as to conform to a plan submitted by the city engineer, providing for the covering of same.

Be it further ordained That the plan and system of drainage for the city of New Orleans, as recommended in their report by the advisory board on drainage for the city of New Orleans as amended by plans of the city engineer relative to the covering of the main canal on Broad street, be and the same are hereby approved and ratified by the common council of the city of New Orleans.

Be it further ordained, That the city engineer be and he is hereby directed to prepare detailed plans and specifications for the execution of work as provided in this ordinance.

And the city engineer is hereby authorized to draw for the cost of the preparing of said detail plans and specifications and continuance of said bureau from the funds in the treasury of the city of New Orleans set aside for drainage purposes, and the comptroller be and he is hereby directed to transfer the sum of $5,000 five thousand dollars, from amount set aside for drainage purposes in accordance therewith.

Adopted by the council of the city of New Orleans, July 9, 1895.

DAN A. ROSE,
Clerk of Council.

Approved July 10, 1895.

JOHN FITZPATRICK, *Mayor.*

A true copy:

CLARK STEEN,
Secretery to the Mayor.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *Oct.* 23, 1895.

No. 11480, council series.

58 Be it ordained, by the common council of the city of New Orleans, That permission be and is hereby granted to the city engineer to secure the services of Messrs. Rudolph Hering, B. M. Harrod and H. B. Richardson as consulting or advisory engineers on the plans and specifications for the drainage which he is now preparing. Be it further ordained etc., that the remuneration for the services of these engineers be approved by his honor, the mayor, and paid out of the funds set aside for the drainage of the city of New Orleans.

Adopted by the council of the city of New Orleans, October 23rd, 1895.

DAN A. ROSE,
Clerk of Council.

Approved October 23, 1895.

JOHN FITZPATRICK, *Mayor.*

A true copy:
CLARK STEEN,
Secretary to the Mayor.

A true copy
(Signed) C. H. LA VILLEBEUVRE,
Secretary to the Mayor.

59 & 60–60 *Report of the Drainage Commission, Offered in Evidence be Defendant, Marked Defendant "I."*

Filed January 29th, 1901.

Extract of the Proceedings of the City Council of Date January 24th, 1896, Offered in Evidence by Defendant.

Filed Jan. 29th, 1900.

Office of the clerk of council.

CITY HALL, NEW ORLEANS, LA., *January 16th*, 1901.

61 I hereby certify that the following is a true and correct copy of the extracts of the proceedings of the city council of date January 24th, 1896, relative to the adoption of specifications for drainage under ordinance No. 10.991 C. S. reported favorably this date January 24th 1896 by joint committees 2, 8, and 9, with the following amendments.

Amendments.

On page 33 strike out lines 14, 15 and 16 and all after the word "contract" in line 19 up to and including line 20.

On page 37 strike out all after the word "engineer" in line 11, up to and including line 15 and insert the following: In case of any disagreement in regard to price the matter shall be left to arbitration.

On page 70 after line 8: "or such standard as may be adopted."

On page 40 after the word "engineer," in line 10, add: and the commissioner of public works.

A general discussion of the specifications and amendments occurred, participated in by Messrs. Boes, Noel, Dickson, Kane, Louque, Gautier, Mayer, Murray, Desporte and Gately.

Responsibility of Contracts and Sub-contracts.

Mr. Noel then moved to strike out on page 33 lines 14, 15, and 16 and all after the word "contract" in line 19 up to and including line 20, seconded by Mr. Dickson and adopted by *viva voce* majority vote.

Mr. Noel moved to adopt the following:

Extra work.

On page 37 strike out all after the word "engineer," in line 11, up to and including line 15, and insert the following; in case of any disagreement in regard to price, the matter shall be left to arbitration."

The chair called attention to the fact that the amendment was not specific enough, and failed to designate the mode of selection of the arbitrators. This point was then covered by Mr. Noel by this additional amendment: "Such disagreement shall be settled by arbitration as provided for in these specifications" adopted by *viva voce* vote.

62 Mr. Noel moved to adopt the following "On page 70, after line 8, add "Or such standard as made by adopted" This was adopted by *viva voce* vote.

Mr. Noel moved to adopt the following: After the word "engineer" in line 10 add: "and the commissioner of public works."

After discussion of this amendment and its bearing, the chair ruled it was incomplete this was covered by Mr. Noel offering to amend by adding the words "wherever it applies." The amendment, as amended, was then adopted, the clerk instructed to make such change wherever necessary.

Mr. Noel then moved to amend "On page 82 section 2, strike out all after the word "understood."

During a discussion of this amendment the chair suggested that he saw no harm to result from the original clause remaining, as in

his opinion, it would prove a safe guard to the city's interest to know that it was dealing with responsible manufacturers of known merit, etc.

Mr. Noel then explained his reasons for offering an amendment, and it was finally adopted by a majority rising off 19 yeas to 2 nays.

Mr. Noel then offered an amendment on page 33 under the head of sub-contracts, to strike out the following: should any sub-contractor fail to perform the work undertaken by him, in a satisfactory manner, the contractee may end and terminate such sub-contract. Adopted.

Time of completion.

On page 94 under this head, Mr. Murray offered the following amendment: "That the drainage work shall be commenced simultaneously and executed in the various districts as rapidly as circumstances will permit." A discussion of this amendment resulted in its being lost by a vote of five yeas to sixteen nays.

Mr. Kane offered the following amendment "No contract or sub-contract shall be awarded to any but parties who are reputed to be masters of the branch of the work." After discussion this
63 amendment was lost by a majority *viva voce* vote.

Mr. Noel then offered the following amendment; "Insert on last page last clause the following: "Bidders shall also bid a fix-sum for the entire work, as set forth in the specifications besides bidding in the manner described above." Adopted.

Mr. Ga-tier offered the following amendment: "Page 1, etc., proposals for drainage, etc., to amend by striking out, $100,000 and inserting $50,000 for deposit." Adopted.

Mr. Gautier offered the following amendment: "On page 35, etc., contractor's bonds strike out, $500,000. and insert $200,000 for bond. Adopted.

There being no further amendments offered Mr. Gately moved to postpone final consideration for one week. This motion was lost by a *viva voce* vote.

Mr. Kane argued the further delay, and after discussion a final vote was had on the specifications, as amended, and they were finally adopted as amended by a majority of *viva voce* vote.

(Signed) T. W. CAMPBELL,
Clerk of Council.

Continued.

Extract from Minutes of Division "E."

WEDNESDAY, *January 16th*, 1904.

Present: The Hon. Geo. Theard, judge.

This case came on this day for trial.

Present: Chas. F. Buck, Esq., for plaintiff. W. B. Spencer, Esq., for defendant.

And after hearing pleadings and evidence, the court ordered the matter continued by preference for argument.

Note of Evidence for Plaintiff.

Filed January 30th, 1901.

64 By consent in open court before the argument began the following additional note of evidence was made and the evidence received subject to an objection of counsel for defendant on the ground of irrelevancy which the court overruled as going to the effect and bill was reserved, viz:

Counsel for plaintiff offers—

I. Act No. 100 act of 1845 amending charter of New Orleans Gas Light Co.

II. Decision of supreme court of La. Chacity Hospital *vs.* Gas Co. 40 Ann., page 382 to be used and referred to in the official publication.

III. A statement Exhibit "A" annexed and filed showing amount of gas annually furnished free to the charity hospital and at half rate to other charitable institutions and public buildings.

(Signed) HOWE, SPENCER & COCKE,
Att'ys for Def't.
BUCK, WALSHE & BUCK.

Statement Exhibit "A."

Filed February 1st, 1901.

A. H. Sieward, pres't; Duncan Jones, sec'y; F. E. Richmond, treas.

Office of N. O. Gas Light Company.

Gas consumed by charity hospital free of charge, delivered in accordance with the obligation fixed in the charter, amount in dollars and costs, if charged at regular rates as follows:

1894	$3721.00
1895	4792.50
1896	5363.00
1897	5394.50
1898	6069.50
1899	6219.50
1900	6921.75
	$38481.75

65 These amount- would be subject to a discount of 35%, if paid within a time limit.

Difference Between Amount Paid for Gas by Charitable Institutions During Year 1900 and Regular Price Charged Consumers.

January	$178.24
February	164.99
March	143.91
April	124.24
May	93.86
June	85.11
July	82.61
August	85.93
September	98.32
October	133.18
November	153.08
December	195.49
	$1,538.96

Agreement Offered in Evidence by Plaintiff.

Filed January 30th, 1900.

Civil Dist. Ct., Div. E.

NEW ORLEANS GAS LIGHT CO. *vs.* DRAINAGE COMMISSION OF N. O. } No. 60609.

It is stipulated and agreed between counsel for plaintiff and defendant.

1. That the following items shall in event of judgment in favor of plaintiff be deducted from the amount awarded it, to-wit

March 31, 1899.	Services engineer & foreman	$75.00
April 30, 1899.	" " "	125.00
May 30, 1899.	" " "	125.00

66 2. And the following items shall be rejected as in case of non-suit, to-wit:

Jan'y 31/99.	Loss of sale of gas on St. Louis St. bet. Romain & Basin Sts. from September 15 1898 to Jan'y 31 1899 4½ mos. at $20	90.00
Feb'y 28/99.	Ditto for month of Feb'y 1899	20.00
March 31/99.	Ditto for month of March '99	20.00
Apr. 30/99.	" " " " " "	20.00
May 30/99.	" " " " " "	20.00

3. In other respects the account of expenses of charges, removals etc., filed with the petition as "Exhibit A" is correct.

(Signed) BUCK, WALSHE & BUCK,
Att'y- for Pl'ff.

" HOWE, SPENCER & COCKE,
Att'ys for Defendant.

Judgment.

NEW ORLEANS GAS LIGHT CO.
vs.
THE DRAINAGE COMMISSION OF NEW ORLEANS. } No. 60609.

This case came on this day for argument.

Present: Chas. F. Buck, Esq., for plaintiff. W. B. Spencer, Esq., for defendant.

And after hearing counsel, the court considering the law and evidence to be in favor of defendant, for the reasons orally assigned:—

It is ordered, adjudged and decreed that there be judgment herein rejecting the plaintiff's demand at its cost.

Judgment rendered in open court January 30th 1901.

Judgment signed in open court February 5th 1901.

(Signed) GEO. H. THEARD, *Judge.*

67

Judgment Signed.

Extract from Minutes of Division "E."

TUESDAY, *February 5th*, 1901.

Present: The Hon. Geo. H. Theard, judge.

N. O. GAS LIGHT CO.
vs.
DRAINAGE COMMISSION OF N. O. } 60609.

The judgment rendered in the above entitled and numbered case on January 30th 1901 was signed this day in open court.

Motion of Appeal.

Filed February 2nd, 1901.

Civil Dist. Court, Div. E.

THE NEW ORLEANS GAS LIGHT CO.
vs.
DRAINAGE COMMISSION OF NEW ORLEANS. } No. 60609.

To the honorable the judges of said court:

On motion of Buck, Walshe & Buck, attorney- for defendant and on suggesting to the court that defendant herein is informed and

believes that there is error to its prejudice in the final judgment herein rendered on the 30 day of Jan'y 1901 and signed on the 5th day of Feb'y 1901, and is desirous of having and prosecuting a suspensive appeal therefrom,—

It is ordered:—That a suspensive appeal be allowed herein to said defendant from said judgment to the honorable the supreme court of the State of Louisiana returnable in said court on the first Monday in March 1901 there not being sufficient time to complete the transcript for the next return day which is the third Monday of the instant month, on appellant giving bond with good and solvent security in the amount of two hundred and fifty dollars the conditions required by law.

Bond of Appeal.

Filed February 12th, 1901.

68 Know all men by these present-, that, we The New Orleans Gas Light Co. as principal and A. H. Sieward as surety are held and firmly bound unto Thomas Connell clerk of the civil district court, for the parish of Orleans, his successors, executors, administrators, and assigns in the sum of two hundred and fifty 00/100 — for the payment whereof we bind ourselves, our heirs, executors, & administrators firmly by these presents.

Sealed with our seal, and dated in the city of New Orleans, on this 12th day of Feb'y *day of February* in the year of our Lord one thousand nine hundred and one.

Whereas, the above bounden N. O. Gas Light Co. has this day filed a motion of appeal from a final judgment rendered against it in the suit of said New Orleans Gas Light Co. *vs.* Drainage Commission of New Orleans.

No. 60,609, of the civil district court for the parish of Orleans on the 30th day — Jan'y 1900 and signed on the 5th day of Feb'y 1901.

Now the condition of the above obligation is such, that the above bound New Orleans Gas Light Co. shall prosecute its appeal and shall satisfy whatever judgment may be rendered against it or the same shall be satisfied by the proceeds of its estate real or personal, if it be cast in the appeal; otherwise that the said A. H. Sieward shall be liable in its place.

(Signed) A. H. SIEWARD, *Pres't.* [SEAL.]
" A. H. SIEWARD. [SEAL.]

Signed, sealed and delivered in the presence of

CHAS. F. BUCK.

69 *Certificate.*

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

I, William B. Murphy, deputy clerk of the civil district court for the parish of Orleans, do hereby certify that the foregoing seventy five (75) pages do contain a true correct and complete transcript of all the proceedings had, documents filed and evidence adduced upon the trial of the cause wherein New Orleans Gas Light Company is plaintiff and The Drainage Commission of New Orleans is defendant, instituted in this court and now in the records thereof under the No. 60609 of the docket thereof div'n E., the Honorable Geo. H. Theard, judge. Pamphlet, charter New Orleans Gas Light Co. filed by plaintiff Jan'y 30, 1901, & pamphlet decision U. S. Supreme Court, No. 18, October term, 1885, filed by plaintiff, Jan'y 31, 1901. Pamphlet report on the drainage of the city of New Orleans, filed by defendant Jan'y 29, 1901 and pamphlet specifications for the construction of a system of drainage for the city of New Orleans, La., filed by defendant Jan'y 29, 1901 forwarded as filed.

In testimony whereof, I have hereunto set my hand and affixed the impress of the seal of said court at the city of New Orleans, on this sixth day of March in the year of our Lord, one thousand nine hundred and one (1901) and in the one hundred and twenty fifth year of the Independence of the United States of America.

[SEAL.] W. B. MURPHY, *D'y Clerk.*

70 *Continuance.*

NEW ORLEANS, FRIDAY, *January* 10, 1902.

The court was duly opened, pursuant to adjournment.

Present: Their honors Francis T. Nicholls, chief justice Joseph A. Breaux Newton C. Blanchard Frank A. Monroe Olivier O. Provosty associate justices.

THE NEW ORLEANS GAS LIGHT COMPANY
vs.
THE DRAINAGE COMMISSION OF NEW ORLEANS. } No. 13897.

This case was ordered by the court to be continued with preference.

Cause Submitted.

NEW ORLEANS, FRIDAY, *February* 7, 1902.

The court was duly opened, pursuant to adjournment.

Present: Their honors Francis T. Nicholls, chief justice, Joseph A. Breaux, Newton C. Blanchard, Frank A. Monroe, Olivier O. Provosty, associate justices.

THE NEW ORLEANS GAS LIGHT COMPANY
vs.
THE DRAINAGE COMMISSION OF NEW ORLEANS. } No. 13897.

This case came on this day to be heard and was argued by Mr. Charles Francis Buck, of counsel for the plaintiff and appellant, and by Mr. William Wirt Howe, of counsel for the defendant and appellee. The court then took the cause under advisement upon the briefs now on file for both parties.

71 *Judgment of the Court.*

NEW ORLEANS, SATURDAY, *June* 21, 1902.

The court was duly opened, pursuant to adjournment.

Present: Their honors, Francis T. Nicholls, chief justice, Joseph A. Breaux, Newton C. Blanchard, Frank A. Monroe, Olivier O. Provosty, associate justices.

NEW ORLEANS GAS LIGHT COMPANY
vs.
THE DRAINAGE COMMISSION OF NEW ORLEANS. } No. 13897.

On appeal from the civil district court, parish of Orleans.

The law and the evidence being in favor of plaintiff and against the defendant, the judgment appealed from is annulled, reversed and avoided.

It is further ordered, adjudged and decreed that the plaintiff have judgment against the defendant for the sum of three thousand five hundred and seventy-one and 38/100 dollars ($3,571.38). It is further ordered, adjudged and decreed that the six items dated respectively January 31, 1899, to May 30, 1899, are rejected as per agreement of parties in this case as in case of non-suit. Costs of both courts to be paid by defendant and appellee. (Blanchard and Provosty, JJ., dissent.)

Opinion of the Court.

UNITED STATES OF AMERICA,
State of Louisiana.

Supreme Court of the State of Louisiana.

NEW ORLEANS, SATURDAY, *June* 21*st*, 1902.

The court was duly opened, pursuant to adjournment.

Present: Their honors, Francis T. Nicholls, chief justice, Joseph A. Breaux, Newton C. Blanchard, Frank A. Monroe, Olivier O. Pro-

vosty, associate justices. His honor Mr. Justice Breaux, pronounced the opinion and judgment of the court in the following case:—

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SATURDAY, *June* 21*st*, 1902.

THE NEW ORLEANS GAS LIGHT COMPANY
vs.
THE DRAINAGE COMMISSION OF NEW ORLEANS. } No. 13897.

Appeal from the civil district court, parish of Orleans.

(Mr. Justice BREAUX:)

Plaintiff brought this suit to recover for damages to its property by removing its mains and pipes. The legislative act of incorporation of the plaintiff company is dated April 1st, 1835.

The company was authorized to lay pipes and conduits in the public ways and streets, not contrary to public convenience, a right of which it availed itself in due time after its franchise had been granted. Plaintiff has furnished lights to the charity hospital as required by the charter and has complied with other conditions.

The company went into possession of its grant when the limits of the city were much less extensive than they are now and when its population was less than one-fifth of its present number. It has laid mains, pipes, and conduits in pursuance with the charter stipulations.

On the other hand defendant traces its history back to an ordinance of the city council which ordained that initiatives should be taken toward establishing a complete and comprehensive plan of drainage. Surveys were made, plats drawn, and a plan adopted.

To carry out this plan, a city ordinance, in the year 1893, placed aside the sum of seven hundred thousand dollars (the price of city franchises sold) as a sacred fund to be expended exclusively for drainage.

In 1896 (statute 114) a board was organized in accordance with the statute named the "Drainage Commission of New Orleans," whose members were named officials of the city of New Orleans, of the Orleans levee board, and of the board of liquidation of
73 the city debt.

By section 4 of this statute, to the commission was delegated the power to direct and execute, and substantially to carry out the plan of drainage adopted by the city council. They were given the right of expropriating property and to do all needful works of drainage in the streets. This commission claims to have followed a proper plan of drainage under the statutes and ordinances in which they find their power to act and they further claim that their work was properly laid in the different streets. That the different canals were in effect located by the legislature; that it always sought, as much as possible, to minimize all unavoidable interference with the property interests of others.

The defendant further avers in substance that the drainage canals were of reasonable depth and width and were properly located, and that all of its work was a necessary public work. We think the foregoing is a sufficient statement of the case for the decision.

We take it that it devolves upon the courts to interpret the statutes and ordinances so as not to impair the functions and usefulness of the plaintiff corporation under its charter and at the same time that the right of the defendant is to remain as evidently intended by the statute. That each, within the sphere intended, should be left to do the useful work for which it was created. Taking up for decision the points of difference between the two companies, it becomes evident that it grows out of the desire of defendant to appropriate under the exercise of the police power, and of the plaintiffs to recover the expenses of removing and relaying its gas mains and pipes, a work done in order to make room enough for defendant company's drains. In the one case, appropriation, no indemnity is due, and in the other, expropriation (a power the defendant has) the damages are compensable. Decisions are cited by defendants in which the right of appropriation has been recognized, and they say they control the issues in the case before us for decision. These decisions were rendered in cases of appropriation of land on
74 the river front, presenting a different issue.

The lands referred to in Bass *vs.* State, 34 A. 494, and Chaffe *vs.* Trezevant, 38th A. 746, were owned subject to a servitude. This right on the river front is unquestioned. It is of very ancient origin; its date is coeval with government. On this continent, when the territory was ceded to the United States, the servitude on navigable rivers passed to the public. The State has a right "of servitude over the lands on the shores of navigable rivers for making repairs to levees, roads, and other public works. Eldridge *vs.* Trezevant, 160 U. S. 462.

When, therefore, in the cases cited *supra* "appropriation" was resorted to, there was no encroachment upon private property. The defendants in the cases cited above bought the property subject to this right of servitude.

Defendants in the case before us for decision insist that their case is within the law and cite in support of their contention a decision of the Supreme Court of the United States in which they contend the Bass and Chaffe cases received approval. We have not found in this decision the approval as going to the length for which defendants contend. It (the decision cited *infra*) held that the question involved was not a Federal question, and particularly stated that the question was one especially within the sovereign control of the State. The court did not stop with this announcement. It went out of its way to say, that, it is difficult to see how it would be possible to take private property wherever situated and apply it to any public purpose without compensation by terming the action an exercise of the police power and that it would be particularly difficult to see how such a conclusion can be reached by the court of a State in

whose constitution is to be found a provision, that, private property shall not be taken for public use without just and adequate compensation first made. Eldridge *vs.* Trezevant, 160 U. S. 465.

Defendants we imagine find very little support in this decision. The decision evidently looks to compensation as just and not to be overlooked.

75 The franchise granted to the plaintiffs and the right to lay their pipes and mains in the streets was not granted subject to a restriction. It was an unlimited grant (as relates to the police power claimed here) and is different from the servitude which burdens riparian property. But, returning to the question of the police power proper, we must bear in mind that all works of public improvement in which communities are greatly interested do not afford ground to appropriate property under the police power or cause damage without the least concern about indemnity.

True, in the presence of a great calamity, the right arises and the question of the ownership of the property pales into insignificance. The right then is bold and independent but it is to be exercised by the State and not by subordinate agencies to which it has not been delegated expressly.

With reference to a cause of action not entirely similar to the one here (but the principle has application) the Supreme Court of the United States has said "Except in cases where property may be destroyed to avert a conflagration or the ravages of pestilence or be taken under the pressure of an immediate and overwhelming necessity to prevent a public calamity, the power of the State over the property of the citizen does not extend beyond such limits."

In other cases, the owner has an absolute right which he cannot be made to surrender except under the power of eminent domain for works of public utility and for compensation previously made. We have seen that plaintiffs' claim is for the expenses of removing and relaying their mains. Beyond this we do not go, and we are not called on to go further. The right is protected by article 167 of the constitution: "Private property shall not be taken or damaged for public purposes without just and adequate compensation being first made."

We grant that this protection must give way to the *sovereign* authority when it is in the exercise of the police power in great emergencies. Let us assume for the purpose of illustration that, after many years of underground occupancy of a public street, a

76 company is called upon to move and get out of the way by another company. "Do not stand upon the order of your going. Take your pipes and mains with you and pay your own expenses." May it (the company sought to be ejected) not ask the ejector by what authority you propose to impose the expense upon me, and if the answer is the police power, may it not request it to point in the statute to the delegation claimed, and if it be not found, may it not in answer say: "Room shall be given, but you must pay the expense to which I will be put."

Evidently it, the police power, was not delegated either expressly or by intendment, because it was intended to let the defendant exercise the right of eminent domain and pay for expropriated property, or for damages occasioned.

The police power generally resides in the State.

Here the defendant claims a right under the police power. The statute contains no express grant to exercise such a power. Even as to the State it has been decided that over corporations which have continuously complied with their charters, it held only the control which it exercises over the property of individuals engaged in similar businesses. Railroad tax cases, 13 Fed. Rep. 755, and the exercise of the general police power "of a State does not authorize it to damage private property except for purposes before mentioned." Hollingsworth *vs.* Tensas, 17 Fed. Rep. 109.

"Police power can only be exercised by legislative enactment and it rests solely with legislative discretion to determine when public welfare or safety requires its exercise." (We have verified this reference to decisions and found that they support the text.) Eng. and Amer. Enc. of Law, vol. 18, p. 746. "Legislative discretion" has not spoken in this case.

There is ample room for both and under the rule which requires every one to so use his own, and so conduct himself as not to injure his neighbor or impair his rights, we think that the defendant cannot do less than pay the expenses.

The law and the evidence being in favor of plaintiff and against defendant, the judgment appealed from is annulled, reversed
77 and avoided.

It is further ordered, adjudged, and decreed that the plaintiff have judgment against the defendant for the sum of three thousand five hundred and seventy-one and 38/100 dollars ($3571.38)

It is further ordered, adjudged, and decreed that the six items dated respectively January 31, 1899 to May 30, 1899 are rejected as per agreement of parties in this case as in case of non-suit.

Costs of both courts to be paid by defendant and appellee.

Blanchard, J. and Provosty J., dissent.

(*Syllabus.*)

Plaintiff has a grant by the legislature and the privilege of establishing gas works and of supplying the inhabitants with gas light by means of pipes laid in the streets. It has complied with its obligations as grantee.

Another company is without authority to remove its pipes and interfere with its mains without incurring liability for the breakage done and removal of pipes and mains.

The State has delegated the power of eminent domain to the defendant. This implies compensation for expropriation and for damages done. The State has not delegated to the defendant the

right of exercising the police power which implies that dam-
78 ages may be committed without compensation. The exercise of the police power remains in the State unless expressly or impliedly delegated. It was not expressly or impliedly delegated.

If the police power may be exercised to compel one company to remove and relay its pipes and mains without compensation to the owner to make room for another company, it must be exercised by the State.

The claim of plaintiff for expenses of actually removing and relaying its pipes and mains is allowed and judgment is accordingly rendered.

[Endorsed:] 13897. N. O. Gas Light Co.

79 *Petition for Rehearing.*

Supreme Court of Louisiana.

THE NEW ORLEANS GAS LIGHT COMPANY
vs.
THE DRAINAGE COMMISSION OF NEW ORLEANS. } No. 13897.

To the honorable the supreme court of Louisiana:

The petition of The Drainage Commission of New Orleans, appellee in this case respectfully represents:

That there is error to its prejudice in the opinion and decree of the court delivered herein on the 21st of June inst., and it respectfully asks for a rehearing of the cause.

It is submitted that the court has erred in asserting that because the legislature has delegated to the Drainage Commission of New Orleans the power to expropriate property, the commission has no power to "appropriate" under the exercise of the police power. It is elementary that the right of eminent domain is one thing, and the right to exercise the police power is quite another; and no reason is perceived why the recognition of the right of the drainage commission to expropriate could be construed as a denial of the power to appropriate.

It is also submitted that a central error in the opinion of the court is the statement that police power has not been delegated to the Drainage Commission of New Orleans. It is elementary that the whole matter of drainage for the benefit of public health and public convenience belongs to the domain of the police power. (Tiedeman on Police Power, p. 445.) In the case of State *vs.* Flower, 49 An., 1199, your honors construed and justified the establishment ofthe Drainage Commission of New Orleans as a valid exercise of the police power (see p. 1202); and the whole theory of the case as op-
80 posed to the technical points set up on the other side, was that the act No. 114 of 1896 was a delegation of police power on this subject by the State to a subordinate instrumentality,

a political body established by the act. The statute in question constitutes a full delegation of the police power upon the subject to the commission; and in section 4, the legislature even authorizes the commission to make rules and regulations in the form of local ordinances, whose violation makes the offender liable to fine and imprisonment.

It is further submitted that your honors have erred in your appreciation of the doctrine of "appropriation" as established in the decisions with regard to taking lands of riparian owners for levee purposes. If the use of such lands is an exercise of the police power of the State, and is *damnum absque injuria*, because the State has a right of servitude over lands on the shores of navigable rivers for the making and repairing of levees, roads, and other public works, still more has the State, and the drainage commission, to which the State has delegated its police powers in the matter of drainage, a right with respect to the streets of the city of New Orleans. The right is larger and plainer than that affirmed in the levee cases. The streets do not belong to the gas company subject to a servitude on the part of the State, or the city, or the drainage commission to build its works. On the contrary, the streets belong to the public. It has often been decided that the fee of the streets is in the public, or in the city as a trustee for the public, and the right, therefore, of the State, or of a subordinate political body by delegation from the State, to use the streets for the interest of public convenience and public health is greater and clearer than the right to use other people's property for levee purposes. The gas light company is a corporation created for the purpose of making money, just as
81 much as if it had been incorporated to build and operate a cotton mill. It has been allowed to lay its pipes in the streets, but no particular portion of the street has been given to it. In our briefs already on file, this subject has been fully discussed, and it has been demonstrated that the rights of the gas light company in this matter are always subject to the superior right of the State and of the drainage commission by delegation from the State. It is respectfully asked that the court review the numerous decisions cited in the briefs of this petitioner.

The streets of New Orleans belong to the public. The question in the case is one of regulation under a police power that is inalienable, and cannot be bargained away. The right of the gas company to lay its pipes in streets that do not belong to it in any way, or by any title, is not a vested or contractual right as to any special part of the subsoil of the street. So far as the strictly contractual rights of the gas company are concerned, they must be measured by the law in existence in 1835 and 1870. The rule laid down by Mr. Justice Brewer in National Water Works Co. *vs.* City of Kansas, 28 Federal, 921, is the law of this case, and has never been overruled. There has never been any taking of the property of the gas company in the sense of the Constitution, nor any injury done to the gas company in the legal sense. It is a plain case of *damnum absque*

injuria like that of Vidalat against the City of New Orleans, 43 An. 1121, and National Water Works Co. against City of Kansas, above cited.

See also: Bass *vs.* State, 34 An. 494; Peart *vs.* Levee District, 45 An. 421; Eagan *vs.* Hart, 45 An. 1360; Carondelet Canal & Nav. Co. *vs.* New Orleans, 38 An. 308; Ruch *vs.* City of New Orleans, 43 An. 275; Pontchartrain R. R. Co. *vs.* Levee Commissioners, — An. 570; Eldredge *vs.* Trezevant, 160 U. S. 455; Dubose *vs.* Levee Commissioners, 11
82 An. 165; R. R. Co. *vs.* Wakefield, 103 Mass. 261; City of Cincinnati *vs.* Penny, 21 Ohio State, 499; Brown *vs.* Duplessis and City of New Orleans, 14 An. 842; Dillon, Municipal Corporations, secs. 656, 671; Lewis on Eminent Domain, secs. 107, 109.

Petitioner, therefore prays for a rehearing of this cause, and for general relief.

Respectfully submitted,

(Signed) HOWE, SPENCER & COCKE,
Attorneys for Petitioner.

(Endorsed:) No. 13,897. Supreme court of Louisiana. The New Orleans Gas Light Company *versus* The Drainage Commission of New Orleans. Petition for rehearing. Filed June 27, 1902. (Signed) T. McC. Hyman, clerk.

Rehearing Granted.

NEW ORLEANS, MONDAY, *March* 16, 1903.

The court was duly opened, pursuant to adjournment.

Present: Their honors Francis T. Nicholls, chief justice, Joseph A. Breaux, Newton C. Blanchard, Frank A. Monroe, Olivier O. Provosty, associate justices.

THE NEW ORLEANS GAS LIGHT COMPANY
vs.
THE DRAINAGE COMMISSION OF NEW ORLEANS. } No. 13897.

By the COURT: It is ordered that the rehearing applied for in this case be granted.

Continuance.

NEW ORLEANS, MONDAY, *April* 27, 1903.

The court was duly opened, pursuant to adjournment.

83 Present: Their honors Francis T. Nicholls, chief justice, Joseph A. Breaux, Newton C. Blanchard, Frank A. Monroe, Olivier O. Provosty, associate justices.

(On rehearing.)

THE NEW ORLEANS GAS LIGHT COMPANY
vs.
THE DRAINAGE COMMISSION OF NEW ORLEANS. } No. 13897.

This case was ordered by the court to be continued until to-morrow, Tuesday, the 28th day of April instant, 1903.

Continuance.

NEW ORLEANS, TUESDAY, *April* 28, 1903.

The court was duly opened pursuant to adjournment.

Present: Their honors Francis T. Nicholls, chief justice, Joseph A. Breaux, Newton C. Blanchard, Frank A. Monroe, Olivier O. Provosty, associate justices.

THE NEW ORLEANS GAS LIGHT COMPANY
vs.
THE DRAINAGE COMMISSION OF NEW ORLEANS. } No. 13897.

(On rehearing.)

This case came on this day to be heard and was argued by Mr. Charles F. Buck, on behalf of the plaintiff, appellant, until the hour of adjournment, 3 o'clock p. m., when the court ordered the cause to be continued until to-morrow morning, at 11 o'clock, for resumption of argument.

Cause Submitted.

NEW ORLEANS, WEDNESDAY, *April* 29, 1903.

The court was duly opened pursuant to adjournment.

Present: Their honors Francis T. Nicholls, chief justice, Joseph A. Breaux, Newton C. Blanchard, Frank A. Monroe, Olivier
84 O. Provosty, associate justices.

THE NEW ORLEANS GAS LIGHT COMPANY
vs.
THE DRAINAGE COMMISSION OF NEW ORLEANS. } No. 13897.

(On rehearing.)

The trial of this cause continued from yesterday, Tuesday, the 28th day of April instant, was this day resumed, and having heard argument from Mr. Walker B. Spencer, of counsel for the defendnt and appellee, and by Mr. Charles F. Buck, of counsel for the plaintiff and appellant, the court took the cause under advisement upon the briefs for both parties and papers now on file.

Motion for Time to File Briefs.

Supreme Court of the State of Louisiana.

NEW ORLEANS GAS LIGHT COMPANY
vs.
THE DRAINAGE COMMISSION OF NEW ORLEANS. } No. 13897.

On motion of Buck, Walshe & Buck, attorneys for plaintiff and appellant and on suggesting to the court that appellees have filed a full and elaborate brief on the rehearing which they movers believe in the discharge of their duty they should answer:—

It is ordered: That a delay of ten days be granted movers to file briefs herein.

(Endorsed:) No. 13,897. Supreme court of Louisiana. New Orleans Gas Light Company *vs.* The Drainage Commission of New Orleans. Motion and order for enlargement of delay to file brief. Entered and filed May 15th, 1903. (Signed) T. McC. Hyman, clerk.

85

Final Judgment.

NEW ORLEANS, MONDAY, *November* 30, 1903.

The court was duly opened, pursuant to adj-urnment.

Present: Their honors Francis T. Nicholls, chief justice; Joseph A. Breaux, Frank A. Monroe, Olivier O. Provosty, Alfred D. Land, associate justices.

On rehearing.

THE NEW ORLEANS GAS LIGHT COMPANY
vs.
THE DRAINAGE COMMISSION OF NEW ORLEANS. } No. 13897.

For the reasons herein assigned, it is ordered and decreed that the judgment of this court heretofore rendered in this cause be and it is hereby set aside, and it is now ordered, adjudged and decreed that the judgment of the district court appealed from herein be and the same is hereby affirmed and plaintiff's demand is rejected with costs of both courts.

(Breaux, J., dissents.)

Copy of Opinion.

UNITED STATES OF AMERICA,
State of Louisiana.

Supreme Court of the State of Louisiana.

NEW ORLEANS, MONDAY, *November* 30, 1903.

The court was duly opened, pursuant to adj-urnment.

Present: Their honors Francis T. Nicholls, chief justice; Joseph A. Breaux, Frank A. Monroe, Olivier O. Provosty, Alfred D. Land, associate justices.

His honor, the chief justice, pronounced the opinion and judgment of the court in the following case:—

86 NEW ORLEANS GAS LIGHT CO.
vs.
THE DRAINAGE COMMISSION OF NEW ORLEANS. } No. 13897.

On rehearing.

NICHOLLS, *C. J.*:

In an able brief filed on behalf of the defendant it is forcibly urged 1st—

That the gas Co. had only the right of user in the public streets along with all other citizens and acquired no right of "ownership" or "property" in or to any -art of the public streets by virtue of its charter provisions (2 Dillon Mun. Corp. (3rd ed.) 683).

2nd. That it took this right of user subject to the implied condition that the State or the city might in the exercise of its police power for the public health or the public safety, cause other structures to be placed in or on such street which might temporarily inconvenience the gas Co. in its use or which might occasion the removal to another part of the street of its mains and pipes and that any damage resulting from such temporary inconvenience or such removal was *damnum absque injuria*.

They maintain that the gas Co. was given the exclusive right to sell gas in the city of New Orleans and as a necessary incident to enable them to carry on the business of furnishing the public with gas, it gave it the right to lay its mains and pipes under and through all the streets and alleys of the city and implied a right to maintain the same, provided that such work should be done and maintained with as little inconvenience to the public as possible, but it was not given an exclusive right to the use of the streets, nor a property right in or to any particular portion of the street. The legislature did not designate the particular streets or parts of streets in which the company should

lay its mains and pipes, nor vest the common council or any officer of the city with authority to locate the pipes or regulate the location of the same. The whole subject
87 was left to the judgment and at the risk of the gas Co. with only a warning that they should be laid in such manner as to least inconvenience *to* the public. The gas Co. took the risk of the location of the pipes. If the gas Co. could not acquire any property in the public streets its rights were merely those of user, such a right as any other citizen similarly situated had, or as a street railway had, a right of passage. A- a corollary neither the State nor the city lost the right of control or use of streets for other legitimate purposes and even if the grant of the gas Co. was a public use this did not impair or exhaust the right of the State or the city to make other grants, or to build in such streets other works equally for the public comfort or health. Chicago Railway Co. *vs.* Quincy 27 N. E. Rep. 193 Same *vs.* Same 28 N. E. Rep. 1070 Kansas *vs.* Morley 45 Mo. App. 304.

Counsel urge that the enforced removal of the plaintiff's mains to another part of the street in order to make room for a necessary and important public work was a mere police recognition of its right of user and was in no sense a "taking" or "damaging" of private property or a divesting of a vested right which would entitle it to compensation. Assuming the Co. had a vested right to use some part of the streets did not weaken the position that such vested right could be regulated in a reasonable manner for the public good. It could claim no greater or higher rights than those conferred upon street railway companies by the purchase for a valuable consideration to lay tracks and operate cars upon the streets. Companies of that kind having legislative grants to use the streets can be required by the city in the exercise of its police power for the public safety to erect or maintain gates at their own expense at street crossings and to regulate the speed or length of trains imposing heavy outlays and much inconvenience, though neither the State nor the city could divest them of the right to use the streets without making compensation or make itself liable for damages. The existence of the right of regulation is essential to the
88 welfare of the public and without it the State or city would be powerless to perform its first duty to its citizens of protecting their health, welfare and safety; conditions of life change and what may seem a reasonable and proper use of the streets or what may be ample protection for the health and safety of the citizen in one generation might be utterly unreasonable or inadequate for another. The power to regulate the streets is not only a continuing power but an inalienable one. This being the case all privileges such as the plaintiffs claims must be understood to have been granted and accepted subject to the implied condition that the State or city in the exercise of the police power may regulate, limit or modify that use whenever and wherever the safety health or welfare of the public demand it. The State or city might not be permitted to

completely deny or destroy the right or to so unreasonably regulate it as to amount to a denial or destruction, but such was not the situation at bar. Plaintiff had not been deprived of the right to use a single street where its mains had been laid it had only been required to remove them to one side of the street so as to permit the construction of sewers. The public health required this and the public would have been inconvenienced had they not been changed.

The legislature intended by the provision in the company's charter that it should lay its mains and pipes "in such manner as may procure the least inconvenience to the city or its inhabitants" that the right granted should be subordinate to the paramount right of the public and that the company should at all times yield without compensation to the necessities of the public welfare.

Counsel refer the court to Mugler *vs.* Kansas City 123 U. S. 623 and the authorities therein cited to National Water Works Co. *vs.* Kansas City 28 Fed. Rep. 921. Railroad Co. *vs.* Wakefield 103 Mass. 261. Jamaica Bond Co. *vs.* Brookline 121 Mass. 5. Columbus Gas Co. *vs.* Columbus (supreme court of Ohio) 19 Lawyer Reports Annotated 510. Cincinnati *vs.* Penny. 21 Ohio State 499. Clapp
89 *vs.* City of Spokane 53 Fed. 516. State *vs.* Flower 49 Ann'l. 1199.

In citing the case of Columbus Gas Co. counsel say "That was a suit for damages for expense of relocating gas pipes to conform to a charter in the established grade of a street made by the city of Columbus. The court held that a gas company laying its pipes in the streets of a city under a grant from the city in conformity with an established grade does so subject to the right of the city to change the grade of the street whenever the necessities of the public require it; and in the absence of wantonness or negligence on the part of the city the company can not maintain any action for damages caused by the necessity of taking up and relaying its pipes in order to accommodate them to the new grade.

Referring to Jamaica Bond Co. *vs.* Brookline 121 Mass. 5—they say—"This was an action of damages to recover expense of changing the location of certain water pipes. Plaintiff alleged that it had theretofore laid water pipes on the streets under its charter in accordance with the established grade in the street. That the city had changed the grade and required the plaintiff to change the location of the pipes to plaintiff's great injury and damage. The court held that the injury was *damnun absque injuria*. National Water Works Co. *vs.* Kansas City. 28 Fed. Rep. 921 Mr. Justice Brewer is quoted with the following statement.

This was an action for damages. In 1883 the plaintiff Co. laid a waterpipe in one of the streets of Kansas. The grade of this street had been previously established and the plaintiff had been directed by the city to lay a water pipe therein and the same was laid in the place and manner directed by the city. In 1884 the city dug a sewer on said street on the same part of the street in which the plaintiff's water pipe had been laid in consequence of which the

plaintiffs was compelled to take up and lay its pipe in another place. The action was brought to recover the cost and expense of this relocation. The case is even stronger than the case at bar, in that the city had directed the place and manner in which the
90 plaintiff should lay its main and the water Co. contended that under the circumstances it had acquired such a *vested property right* in an undisturbed *location and position* to entitle it to resist any further trespass of invasion thereof. The answer of the city was that the matter of sewerage was one affecting the public health, that it could not if it would, and that it did not if it could, contract away the right to construct sewers in any part of the public streets; that the plaintiff took its contract to lay its pipes on such public streets subject to the paramount and inalienable right of the city to construct its sewers whenever in its judgment the public interest demanded. The learned justice sustained the city's contention and said "Sewerage is a matter unquestionably affecting largely the public health, and no municipality can make a contract divesting or abridging its full control over such matters * * *. The contract between the plaintiff and the defendant is to be interpreted in the light of this well established rule and so interpreted the plaintiff took its right to lay its pipe in the streets of the city, subject to the paramount and inalienable right of the city to construct sewers therein whenever and wherever, in its judgment the public interests demand. Laying its pipes subject to this right of the city, it has no cause of action if in consequence of this right it is compelled to relay its pipes."

Touching the right of the city to have required a change in the location of pipes even in a case of servitude, defendant calls to our attention article C. C. 703 (699) under the heading "of the right of passage or way" which declares that "when the place for the passage is once fixed, he to whom this servitude has been granted cannot change it, but he who owes this servitude may change it from one place to another in order that it may be less inconvenient to him, provided that it afford the same facility to the proprietor of the servitude."

(See on that subject C. C. 773.)

The plaintiff charged that the defendant acting while
91 engaged in the prosecution of the work of laying a system of drainage through the streets of New Orleans under act No. 114 of 1898 had "encroached and trespassed upon its property" laid in the streets of that city under authority of its charter and franchise from the State of Louisiana. Plaintiff contends that its charter is a contract with the State and that none of the rights and obligations therein granted or created, can be changed, enlarged or taken away, either under the constitution of Louisiana or of the United States except by the power of "eminent domain" and then for proper compensation. Citing Clarksburg Electric Light Co. *vs.* Clarksburg, 50 L. R. A. 142. Indianapolis *vs.* Consumers Gas Co. 140 Ind. 114—27

L. R. A. 514. Chicago Gas Co. *vs.* Lake 30 Ills. 42. Louisville Gas Co. *vs.* Citizens Gas Co.

It does not claim that there was actual physical invasion any taking possession or using by the drainage commission of the mains and pipes. Its argument is that the legislature having granted the right to the gas light Co. to lay its mains on the streets for the purpose of its business anywhere, when this rights has been once exercised it will be presumed the pipes are properly laid and the right becomes a vested and fixed property right, and that right can not be disturbed or injured for another public purpose without compensation, duly made under an express or implied exercise of the power of eminent domain. Citing 6th Avenue railway 72 N. Y. 330.

It contends that the simple fact that the particular public work in aid of whose prosecution its own main and pipes are asked to be shifted to another part of the street may be a work in aid of public health or of the public good, relieves the State or city seeking to construct such work from the obligation of making compensation to it for the loss it has been made to sustain in changing its main to accommodate the work. That while the citizen may be forced on some occasions and under some circumstances to submit to losses and injuries to himself through acts of the Government taken for the public welfare, the mere fact that such was the
92 character of the work does not of necessity carry with it that result. That the facts and circumstances of this case do not *to* make it one where no remuneration for damages can be sustained. Plaintiff contends that the police power properly so called as forcing parties to submit to losses and injury without a claim for compensation is a power of " regulation " by the Government over the use and enjoyment *or* property in the interest of the lines and *limits*, health comfort and quiet of all persons and the protecting of all property within the State. (Thorpe *vs.* Rutland R. R. Co. 27 Vermont 149 Cooleys Constitutional Limitations 3rd. ed. chap. 16, page 572.)

Plaintiff contends that the construction of a system of drainage is not a work of " regulation ; " it is simply the prosecution of a public work for the public good, and while therefore private property of any kind whatever may be taken or damaged, inflicting a particular injury must be compensation as falling under the protection of article 267 of the constitution which declares that " private property shall not be taken or *damaged* for public purposes without just and adequate compensation being first made." That the rule announce in the earlier decisions of courts that acts done in the proper exercise of governmental powers and not directly encroaching upon private property, though their consequence might impair its use, were not a " taking " of property within the constitution- provisions, and did not entitle the owner of such property to compensation from the State or its agents or give him any right of action, were decisions rendered in view of the language of the constitutional restriction in the then existing constitutions that " private property should not be

taken for public use without just compensation being made, and ceased to apply after the lang-age of the constitution was altered so as to declare that "private property shall not be taken or "damaged" for public use without just compensation."

That the former constitutions prohibited the "taking" of private property and under judicial construction compensation was
93 demanded only where there was an actual taking of private property, its physical invasion, but now where the constitution prohibits not only the "taking" of private property but its being "damaged" for public uses, the doctrine had been accepted that a *recovery by the owner might be had in all cases* where private property had sustained a substantial damage by the making and using an improvement that was public in its character; that it no longer required the damage to have been caused by a trespass or an actual physical invasion of the owner's real estate or physical injury to the thing damaged, but recovery might be had if the construction and operation of the railroad or other improvement was the cause of the damage even though the latter was *consequential.*

Plaintiff in support of this proposition quotes the syllabus of Chicago *vs.* Taylor reported in 125 U. S. 161, which declares that under the provisions of the constitution of Illinois adopted in 1870, that "private property shall not be taken or damaged for public use without just compensation" a recovery may be had in all cases where private property has sustained a substantial injury from the making and use of an improvement that is public in its character; whether the damage be direct as when caused by trespass or physical invasion of t-e *the* property or consequential as in a diminution of its market value.

This case which is confidently relied upon by plaintiff originated in the circuit court of the United States for the northern district of Illinois, and resulted in a judgment in favor of the plaintiff. It was taken by writ of error to the Supreme Court of the United States and the judgment below was affirmed. The decision of the circuit court was based upon and followed the decision of the supreme court of Illinois in the case of Chicago *vs.* Western Indiana Railroad *vs.* Ayres (106 Ills. 518) which itself was based upon its own prior decision in Rigny *vs.* City of Chicago (102 Ills. 64). The case of Chicago *vs.* Taylor where the owner of property fronting on Lumber St. with Eighteenth St. as a side street to recover the damages sustained
94 by reason of the construction by the city of Chicago of a viaduct on Eighteenth St. in the immediate vicinity of the lot. The construction was directed by special ordinance of the city council under authority conferred by the charter. The lot had been used for years as a coal yard having sheds, machinery, engines, boilers etc., upon it required for the purposes of that business. The effect of the construction of the viaduct was seriously to affect the market value of the lot for the purposes for which it was specially adapted, or for any other purpose for which it was likely to be used,

by reason of access to it from 18th St. being materially diminished and at some points practically cut off with the further result that the use of Lumber St. as a way of approach to the coal yard by its occupants and buyers, and as a way of exit for teams carrying coal from the yard to the customors, was greatly impaired. There was evidence tending to show that one of the results of the construction of the viaduct and the approaches on either side to the bridge over Chicago river, was that the coal yard was often flooded with water, running on to it from those approaches whereby the use of *a* the premises as a place for handling and storing coal was greatly interfered with and often became wholly impracticable. On behalf of the city there was evidence tending to show that the plaintiff did not sustain any real damage and that the inconveniences resulting from the construction and maintenance of the viaduct were common to all other persons in the vicinity and could not be the basis for an individual claim for damages. There was a verdict and judgment against the city. The particular judgment rendered is not found in the report of the case but it was evidently for an amount equal to the reduction in the market value of the lot by reason of the construction of the work.

The city contended that if it was liable at all it was only liable for such damage as was done to the market value of the property by rendering access to it difficult or inconvenient. The court
95 below charged that the real question was—had the value of this property to sell or rent been diminished by the construction of the viaduct. It might be that it could no longer be used for the purposes of a coal yard or for any other purpose for which it had been theretofore used, but that would not be material if it could be rented or sold at as good a price for other purposes, except that if the proof satisfied the jury that any of the permanent improvements put on the lot for any particular business which had been before carried on there, and for which it had been improved, had been impaired and the bridge was raised as before, and the jury could from the proof determine how much these improvements were damaged, the plaintiff would be entitled to recover for such damage to the improvements—that is to say the lot being improved for a specific purpose if the proof satisfied the jury that it could no longer be rented or used for that purpose and that thereby these improvements had been lost or impaired in value; then the impairment of value to these improvements was one of the elements of damage which the plaintiff was entitled to have considered and passed upon and included in his damage."

The court below charged that the flooding of the lot by water running down upon it from the approaches to the viaduct was an element of damage which the jury might consider though if such flooding merely caused inconvenience to the occupant in the conduct of his business—such as his coal getting wet or its becomig more difficult to keep his scales properly adjusted, these were not elements of impairment to the value of the property for purposes of sale.

That although the occupant might have found it difficult to haul coal out of his yard and although it might have been much more unprofitable to conduct the business of selling coal at this lot—that did not weigh upon the question as to the value of the lot.

Opinion.

The New Orleans Gas Light Co. was created by act of April 1st, 1835. By the charter it was authorized to lay pipes and
96 *and* conduits at its own expense in any of the public ways or streets of those localities, having due regard to the public convenience."

By amendments its rights were continued to be enjoyed until 1 April 1895 when its corporate privileges were to expire. By act No. 97 of 1870 (extra session) another company under the name of the Crescent City Gas Light Co. was incorporated which was authorized to lay pipes or conduits at the expense of the company in any of the streets or alleys of the city of New Orleans where the same may be required, in such manner as may produce the least inconvenience to the city or its inhabitants and provided also that the company shall afterwards repair with the least practicable delay the streets they have broken."

The two companies were subsequently consolidated under the provisions of art 157 of 1874. At the period of the passage of these acts and the creation of the corporations the constitutional provisions that private property shall not be damaged for public purposes without just compensation was not in force. The rights and obligations of the parties were given and accepted under the provisions of the laws and the constitution as then *existing*. (Hire *vs.* R. R. Co. 38 Annl. 607).

The case is presented by the plaintiff as if the State the common author of rights and privileges granted to two distinct corporations had secured and granted to the corporations rights, which trenches upon, modified and impaired those accorded to the first, but this is not the case. The Drainage Commission, the defendant in this case does not occupy the position of a second quasi public corporation. It is simply the State itself acting through it on its own behalf and in the general public interest. What the State did was not to grant a concession to a third person but to resume control for itself of that which it had permitted the plaintiff company conditionally and contingently and temporarily to occupy. The State in requiring the plaintiff company to shift the position of its mains to a different part of the street so as to permit the construction on public
97 property of a work of undoubted utility for the public health has simply exercised what it had reserved the right to do, or rather in simply enforced in its own favor against the plaintiff, one of the conditions upon which the right of the use of the streets had been granted to it, a condition subject to the exercise of which it

had accepted the rights and privileges granted to it. A contingency which was contemplated as possible having arisen the plaintiff has no legal ground of complaint. It is not claimed that the mains or pipes of the plaintiff have been injured by being removed to another part of the street, nor that any part of its work or materials have been or will be utilized by the State or city for its own purposes, nor even that the value of the franchise for purposes of sale or rent which was the only damage recognized by the supreme court in the case of Chicago *vs.* Taylor, has been lessened or impaired. The only matter in contest is the sum of money expended by the plaintiff in making the required change of position of the pipes. The franchise itself remains in full force and effect. If this change had been required to have been made in 1878 (before the constitution of 1879) we scarcely think that plaintiff would have raised the issue which it does not or questioned the *absolute right* of the State to have required it to move its pipes and to yield without claim to reimbursement to the public needs. The rights of the State were read into the charter of the company and they fixed the very tenure by which plaintiff acquired its privileges.

The change made in the constitution of 1879 did not alter the tenure by which plaintiff was to occupy the public streets Plaintiff's original obligation- in this respect remained as they had been undertaken at the beginning.

The view which we take of the situation of the parties renders unnecessary any general discussion of the subject matter of the police power of the State or of the right of eminent domain, and of the right of private individuals or corporations to remuneration for their property taken or damaged for the public use.

98

We think it not amiss to say that we do not think that the plaintiff's right can be reasoned out from the standpoint which it would have occupied had the mains and pipes whose position was required to be changed, been laid not on or under the public streets of a city, but on or under property owned by *itself* in *fee simple.* The situation of the plaintiffs in the two cases would have been materially different. Plaintiff says " it is simply hair splitting to argue the question whether or not the gas light Co. has a property right on any of the streets of New Orleans. There is no such contention in this case. The contention is that there is a *property right in the privilege to lay its mains* and in the mains, when so laid in connection with the public purpose for which the franchises of incorporation and the franchises or right to enter upon the streets for the purpose was granted. It is not contended that by reason of the grant to the plaintiff the State or city lost the right of control or use of the streets for other legitimate purposes; it is contended that the plaintiff has a specific and special right which it exercises under special and exclusive grant from the sovereign which being exercised by the grantee reduced to possession and in connection with the purpose for which it was granted by common consent and judicial and legislative authority, constitutes property protected by

constitutional provisions which may be the subject of mortgage, of lease or of sale and if taxed by the governmental authorities as such.

We can not recognize that plaintiff had or has any *vested right* in the premises to occupy any particular part of the public streets. If its right in the premises could be designated as a property right it was *ab initio* not a perfect but an "imperfect" right, contingent and conditional in its nature and character, held subject to the paramount right of the State over the right and controlled by law and regulation of the police authorities. (C. C.) Its right does not rise to the dignity of a servitude established in its favor by a con-
99 tract, it is at best a license subject to modifications as the pubic necessities or convenience might require. McCormick *vs.* Louisiana & N. W. R. R. Co. 109 La. 767.)

We are not called on to decide whether the situation was such as to require absolutely that plaintiff should have altered the position of its mains so as to permit the construction of the drainage canals. That issue is — in this case.

We are of the opinion that the judgment heretofore rendered in the present case is erroneous and that it should *se* set aside.

For the reasons herein assigned it is ordered and decreed that the judgment of this court heretofore rendered in this cause be and it is hereby set aside and it is now ordered, adjudged and decreed that the judgment of the district court appealed from herein be and the same is hereby affirmed and plaintiff's demand is rejected with costs of both courts.

Breaue, *J.* dissents.

100 (*Syllabus.*)

1. The plaintiff company was authorized by an act of the General Assembly prior to the constitution of 1879 to lay pipes and conduits on any of the public ways, alleys and streets of New Orleans where same might be required in such manner as might produce the least inconvenience to the city or its inhabitants. It must be held to have accepted this privilege subject to the paramount and inalienable right of the State to construct or authorize to be constructed by the city sewers or drainage canals under the streets whenever, in its judgment the public interests demanded and in aid of the construction of such sewers to cause the plaintiff company, at its own expense to change the location of its own mains. The State in requiring the shifting of the position of the mains simply enforced in its own favor one of its reserved rights.

2. The rights and obligations of parties are to be tested by the provisions of the constitution of 1879.

3. The plaintiff had no vested right to occupy any particular position in the streets, such right as it had was *ab initio*, not an

absolute but an imperfect right contingent and conditional in its nature controlled by law and the regulation of the police authorities.

4. The only damage claimed in this action is the sum of money expended by the plaintiff in changing the position of its mains. It is not asserted that the pipes of the plaintiff have been injured by removal nor that any of its work or material have been or will be utilized by the State or city for their own purposes, that the value of the franchise has been lessened or that there has been any physical "taking" of its property.

The demand of the plaintiff falls under the rule of *damnum absques injuria.*

101 *Motion and Order to Make Parties.*

Supreme Court of the State of Louisiana.

NEW ORLEANS GAS LIGHT CO. *vs.* THE DRAINAGE COMMISSION. } No. 13897.

On motion of Buck, Walsh & Buck, attorneys for plaintiff herein and on suggesting to the court that this case is appealable to the honorable the Supreme Court of the United States by writ of error and that petitioner intends to apply to the honorable Chief Justice by petition for such writ of error to transfer the case to the Supreme Court of the United States;—that pending this litigation the defendant, The Drainage Commission of New Orleans, created as in the original petition in this suit set forth by act No. 114 of the acts of 1896, approved July 9th, 1896, and acts amendatory thereof, was by provisions of sec. 8 of act No. 111 of the acts of the legislature of 1902, approved on July 8th, 1902, merged with and in the corporation known and existing under the name of the "sewerage and water board," and by said same section of said act No. 111, acts of 1902,—all of the rights, duties and obligations of the then existing Drainage Commission, original defendant herein, was expressly transferred to, vested in, imposed on, and lodged in the said sewerage and water board, a public corporation existing under the laws of the State of Louisiana as aforesaid; that therefore the said sewerage and water board is a necessary party herein and should be made the party defendant instead of said extinct "Drainage Commission" and served with writ of error herein and cited to answer same according to law, said sewerage and water board being to all intents and purposes by effect of said legislation made the successor of the said Drainage Commission, original defendant,—

Therefore, be it ordered by this court, that the Sewerage and
102 Water Board, a corporation created under the law of Louisiana, successor of the Drainage Commission, under section 8, act No. 111 of the acts of the session of the legislature of 1902 be

made a party defendant herein, contradictorily with whom all further proceedings herein shall be had without prejudice.

And it is further ordered; that copy hereof be served on the sewerage and water board through its proper officer the president.

Without admitting that plaintiff in the foregoing motion is entitled to a writ of error to the honorable the Supreme Court of the United States, and without in any manner consenting to the granting of such writ, the Sewerage and Water Board of New Orleans admits that the allegations in the foregoing motion are true, has no objection to be made a party defendant herein and takes notice of said motion and waives service of copy thereof.

New Orleans December 12, 1903.

(Signed) OMER VILLERÉ,
Special Counsel for Sewerage and Water Board.

(Endorsed:) No. 13897. Supreme court of State of Louisiana. The New Orleans Gas Light Co. *vs.* The Drainage Commission. The "Sewerage and Water Board." Successor substituted. Motion to make Sewerage and Water Board party defendant, without prejudice. Entered & filed December 14, 1903. (Signed) T. McC. Hyman, clerk.

Petition for Writ of Error.

Supreme Court of the State of Louisiana.

NEW ORLEANS GASLIGHT COMPANY
vs.
THE DRAINAGE COMMISSION. } No. 13897.

To the honorable the chief justice of the supreme court of the State of Louisiana:

103 The petition of The New Orleans Gaslight Co., plaintiff and appellant in the above entitled and numbered cause respectfully represents:

That on the 30th day of November, 1903 this honorable court rendered a decree and entered a judgment in this cause in favor of the defendant and against your petitioner, which judgment being rendered after and upon the pendency of an application for rehearing from the original decree became final in this court on the day of its rendition, said 30th of November, 1903.

That in the said judgment and decree and in the proceedings prior thereto certain errors were committed to the prejudice of your petitioner as in this petition set forth and more fully detailed in the assignment of errors annexed hereto and filed as part of this petition.

That in this case petitioner has claimed rights and privileges and immunities arising under the Constitution of the United States, and

that the decree and judgment of this honorable court is adverse to the same.

I. That there was drawn in question in this cause the effect and validity of certain legislative enactments set forth in the pleadings herein in so far as said enactments conferred or pretended to confer authority on the defendant herein to remove the gas mains and pipes laid in the public streets under its grant from the State in the original charters and acts conferring franchises, etc., the plaintiff contending and claiming that the authority or pretended authority so conferred and the exercise thereof by the defendant impairs obligations of the contract as embodied in the legislative enactments constituting the charter and embodying the franchises of the plaintiff herein, in violation of paragraph 1, section 10 of the Constitution of the United States, and the decision of this honorable
104 court is adverse to this claim.

II. That it being remembered that the actual removal of mains and pipes done by the plaintiff was so done under protest and under a special agreement that all legal and constitutional rights were reserved,—the case must be dealt with as if the defendant had on its own motion violently and without previous compensation entered upon the property of the plaintiff and removed same causing damage, and accordingly petitioner contends and contended that such removal is a taking and damaging of property by the State through her subordinate agents, the defendant herein, for a public purpose without compensation previously made and without due process of law and in violation of petitioner's contract and property rights as above set forth, and the decision of this honorable court is adverse to this claim.

III. That whatever the effect and intent of the legislative enactments under which the defendant justifies its interference with and the taking and damaging of the property of the plaintiff the effect of the decree and judgment herein rendered by its interpretation of the said enactment, is to impair the rights and privileges of the plaintiff corporation in violation of section 10 paragraph 1 of the Constitution of the United States; and

IV. In this sense the further effect of the decree and judgment of this honorable court authorizing as it does such "taking and damaging" under an alleged exercise of the police power or power of regulation for a public purpose without compensation operates a taking of property without due process of law and a denial to petitioner of the equal protection of the law in violation of the provisions of the fourteenth (14th) amendment of the Constitution of the United States.

That your petitioner desires and is entitled to have a writ of error under said decree and judgment of this honorable court to
105 the Supreme Court of the United States.

Petitioner shows that under an order this day rendered in open court the Sewerage and Water Board a public corporation, made by law the successor of the Drainage Commission has been substituted

as party defendant in this cause contradictorily with whom all further proceedings herein should be had and conducted.

Wherefore petitioner prays that a writ of error may issue in its behalf to the honorable the supreme court of the State of Louisiana wherein is lodged the record in this cause, that a transcript of said record and papers in the cause, duly authenticated, may be sent to the Supreme Court of the United States returnable therein according to law.

And petitioner will ever pray etc.

(Signed) BUCK, WALSHE & BUCK, *Att'ys.*

Order.

Let a writ of error be granted herein to the honorable the supreme court of the State of Louisiana upon appellant furnishing bond with good and solvent security conditioned according to law in the sum of one thousand dollars; and let the Sewerage and Water Board, successor to the Drainage Commission be cited as defendant in error according to law.

New Orleans, Dec. 14th, 1903.

(Signed) FRANCIS T. NICHOLLS,
Chief Justice of the Supreme Court of Louisiana.

(Endorsed:) No. 13,897. Supreme court, State of Louisiana. The New Orleans Gas Light Company *vs.* The Drainage Commission. The Sewerage and Water Board successor substituted as defendant. Petition for writ of error. Filed December 14th 1903. (Signed) T. McC. Hyman, clerk.

106 *Assignment of Errors.*

Supreme Court of the State of Louisiana.

NEW ORLEANS GASLIGHT CO.
vs.
THE DRAINAGE COMMISSION. } No. 13897.

Assignment of errors.

The above plaintiff, and plaintiff in error in connection with the petition for writ of error, makes the following assignment of error-, which it avers are to be found in the opinion, judgment and decree of this honorable court:—

I. That the supreme court of the State of Louisiana erred in failing to hold and decide that the pipes and mains for delivery of gas to consumers are duly and legally laid under and in the "streets and alleys" of the city of New Orleans, under express authority and

permission of legislative grant embodied in the act of incorporation, were constituted a fixed and integral part of the necessary works, plants and machinery of the corporation plaintiff and were in their location and fixture vested rights and property under the charter which constituted a contract between it and the State of Louisiana, protected from impairment by the provisions of section 10, paragraph 1 of the Constitution of the United States:—

II. That the court erred in holding that the violent or forced removal of pipes and the necessary and consequent relaying of same at great expenses, to supply gas to the public which the plaintiff company is bound to furnish on penalty of forfeiture of charter is not a "taking and damaging of property."

III. That the honorable the supreme court of the State erred in holding that the State in the exercise of police power or reserved power of regulation directly or through the agency of a subordinate public corporation could take, damage or interfere
107 with and affect the property of the plaintiff corporation, injuriously without violating constitutional principles, or taking property without due process of law, or denying to plaintiff the equal privilege and protection of the law.

IV. That the honorable the supreme court of the State of Louisiana erred in failing and refusing to hold as claimed and contended for by plaintiff that the right of plaintiff in and to "its mains and pipes" as laid in the streets, and to the undisturbed use and possession thereof as laid in accordance with the grant from the State was an absolute, indefeasible vested right constituting property of value which could not be appropriated, taken or damaged for a public purpose by the State—even under pretense of regulation or exercise of police power except after legal expropriation in the exercise of the State's power of "eminent domain"—for compensation previously made:—

And petitioner prays that the judgment and decree aforesaid, by reason of the errors therein committed as above set forth, may be annulled and set aside and petitioner have the relief originally prayed for.

And as in duty bound petitioner will ever pray, etc.

(Signed) BUCK, WALSHE & BUCK,
Att'ys for Pl'ff in Error.

(Endorsed:) No. 13,897. Supreme court, State of Louisiana. The New Orleans Gas Light Company *vs.* The Drainage Commission. The Sewerage and Water Board successor substituted. Assignment of errors. Filed December 14th, 1903. (Signed) T. McC. Hyman, clerk.

108 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Louisiana before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The New Orleans Gas Light Company, plaintiff, and The Drainage Commission defendant, The Sewerage and Water Board, successor, defendant, No. 13,897, of the docket of said supreme court, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of the clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said The New Orleans Gas Light Company, plaintiff as by its complaint appears. We being willing that error, if any hath been, should be duly
109 corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within 30 days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the fourteenth day of December, in the year of our Lord one thousand nine hundred and three.

[SEAL.] (Signed) H. J. CARTER,
Clerk of the Circuit Court of the United States for the Eastern District of Louisiana.

Allowed by
(Signed) FRANCIS T. NICHOLLS,
Chief Justice.

(Endorsed:) No. 13,897. The New Orleans Gas Light Co. *vs.* The Drainage Commission. The Sewerage and Water board successor, etc. Copy of a writ of error lodged in the clerk's office of the supreme court of State of Louisiana, in pursuance to the statute in such cases made and provided, this 14 day of December, one thousand nine hundred and three. Filed Dec'r 14, 1903. (Signed) T. McC. Hyman, clerk.

Bond for Writ of Error.

Know all men by these presents, that we, The New Orleans Gas Light Company as principal A. H. Sieward, resident in this city as surety are held and firmly bound unto, The Sewerage and
110 Water Board defendant herein as successor, by operation of special laws to The Drainage Commission, original defendant in the full and just sum of one thousand dollars, to be paid to the said Sewerage and Water Board its certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this fourteenth day of December in the year of our Lord one thousand nine hundred and three (1903).

Whereas, lately in the supreme court of the State of Louisiana holding session in and for the State of Louisiana at New Orleans Louisiana, in a suit depending in said supreme court, wherein The New Orleans Gas Light Co., is plaintiff and The Sewerage and Water Board as successor to the Drainage Commission defendant judgment was rendered against the plaintiff, The New Orleans Gas Light Co., dismissing its suit and the said plaintiff having obtained a writ or error, and filed a copy thereof in the clerk's office of the said supreme court to reverse the judgment in the aforesaid suit, and a citation directed to the said Sewerage Board successor to said Drainage Commission citing and admonishing it to be and appear at the Supreme Court of the United States to be holden at Washington, the second Monday of October next.

Now the condition of the above obligation is such, that if the said The New Orleans Gas Light Co., shall prosecute its writ to effect, and answer all damages and cost if it fail to make its plea good then the above obligation to be void else to remain in full — and virtue.

NEW ORLEANS GAS LIGHT CO.

(Signed) A. H. SIEWARD, *Pres't.* [L. S.]
(Signed) A. H. SIEWARD, *As Surety.* [L. S.]

Sealed and delivered in the presence of
(Signed) CHARLES F. BUCK.
(Signed) GEO. C. WALSHE.

111 Approved.
(Signed) FRANCIS T. NICHOLLS,
Chief Justice.

UNITED STATES OF AMERICA,
Eastern District of Louisiana, } ss:

Personally appeared, A. H. Sieward who being duly sworn deposes and says that he is the surety on the within bond, that he resides in the city of New Orleans. State of Louisiana and is worth the full sum of one thousand dollars, over and above all his debts and liabilities and property exempt from execution.

(Signed) A. H. SIEWARD.

Subscribed and sworn before me this 15th day of December 1903.

[SEAL.] (Signed) GEO. C. WALSHE, *Not. Pub.*

(Endorsed:) No. 13,897. Supreme court, State of Louisiana. The New Orleans Gas Light Co. *vs.* The Drainage Commission. The Sewerage and Water Board successor. Bond for writ of error. Filed 14, Dec'r 1903. (Signed) T. McC. Hyman, clerk.

Agreement as to Transcript for Writ of Error.

Supreme Court, State of Louisiana.

THE NEW ORLEANS GASLIGHT CO.
vs.
THE DRAINAGE COMMISSION, THE SEWERAGE & WATER Board, Successor. } No. 13897.

It is agreed between the undersigned, counsel for plaintiff and defendant in error, that in preparing the transcript for the Supreme Court of the United States, the pamphlets A and B offered in evidence by the plaintiff, pamphlet A containing various acts of the legislature constituting in part the charter and history of organization of the plaintiff company, and the pamphlet B, being
112 copy of the decision of the Supreme Court of the United States in the case of New Orleans Gaslight Co. *vs.* The Louisiana Light and Heat Producing Co., reported in 115 U. S. at page 650, be not copied into the transcript, and may be supplied and used in the Supreme Court of the United States in the same form or referred to in the official publications.

It is also agreed that the document — a large printed copy of drainage work specifications offered in evidence by counsel for defendant in error be not copied into the transcript but may be attached thereto in the original and sent up with the transcript.

It is further agreed, that the above documents need not be printed

in the printed record of the Supreme Court unless it is absolutely necessary to do so under the rule of that court.

(Signed) BUCK, WALSHE & BUCK,
For Plaintiff in Error.

(Signed) OMER VILLERÉ,
For Defendant in Error.

(Endorsed:) No. 13,897. Supreme court of Louisiana. The New Orleans Gas Light Company *vs.* The Drainage Commission. The Sewerage and Water Board successor, substituted. Agreement as to transcript for writ of error. Filed Dec'r 22nd, 1903. (Signed) T. McC. Hyman, clerk.

113 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Louisiana before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The New Orleans Gas Light Co., plaintiff and The Drainage Commission defendant The Sewerage & Water Board successor defendant No. 13897 of the docket of said supreme court, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of the clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and
113½ the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said The New Orleans Gas Light Co., plaintiff as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within 30 days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may

cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the fourteenth day of December, in the year of our Lord one thousand nine hundred and three.

{ Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La. }

H. J. CARTER,
Clerk of the Circuit Court of the United States for the Eastern District of Louisiana.

Allowed by

FRANCIS T. NICHOLLS,
Chief Justice.

[Endorsed:] No. 13897 The New Orleans Gas Light Co. *vs.* versus The Drainage Commission The Sewerage & Water Board successor. Writ of error. Filed 14 Dec'r 1903 T. McC. Hyman clerk.

114 THE UNITED STATES OF AMERICA:

Supreme Court of the State of Louisiana.

The President of the United States to the Sewerage Water Board, New Orleans, La., successor of the Drainage Commission, through its proper officer, the president, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington, within thirty days from the date hereof pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana at New Orleans, No. 13897 of the docket of said supreme court,—wherein The New Orleans Gas Light Co. is plaintiff and The Sewerage Water Board as successor to The Drainage Commission is defendant to show cause, if any there be, why the judgment rendered against the said New Orleans Gas Light Co. as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 15 day of December in the year of our Lord one thousand nine hundred & three—1903.

[Seal Supreme Court of the State of Louisiana.]

FRANCIS T. NICHOLLS,
Chief Justice of the Supreme Court of the State of Louisiana.

114½ [Endorsed:] Mayor only 12/19/03 at 10.05 a. m. L. Supreme court of the State of Louisiana. No. 13,897 R. The New Orleans Gas Light Company *vs.* The Drainage Commission The Sewerage & Water Board successor, substituted Citation. Filed Dec'r 22, 1903 T. McC. Hyman clerk.

Sheriff's Return.

Received Friday Dec. 18 1903 and on the 19th day of December 1903 at 10.05 a. m. I served a copy of the within citation on The Drainage Commission, The Sewerage and Water Board, successor substituted defendant herein by personal service on Paul Capdivielle, mayor of the city of New Orleans its president

Returned same day

PETER LAMBERT,
Deputy Civil Sheriff, Parish of Orleans, State of Louisiana.

Peter Lambert, deputy civil sheriff for the parish of Orleans, State of Louisiana being sworn deposeth and says that he made a personal service of a copy of the within citation on the Honorable Paul Capdevielle, mayor of the city of New Orleans president of the defendant company in this suit.

PETER LAMBERT,
Deputy Civil Sheriff, Parish of Orleans, State of Louisiana.

Sworn to & subscribed before me, at the city of New Orleans, this 22d day of December, A. D. 1903.

[Seal Supreme Court of the State of Louisiana.]

T. McC. HYMAN,
Clerk of Supreme Court of Louisiana.

115 *Clerk's Certificate.*

I, Thomas McCabe Hyman, clerk of the supreme court of the State of Louisiana, do hereby certify that the foregoing one hundred and fourteen (114) pages cotain a full, true and complete transcript, (except the report of the drainage commission, offered in evidence by defendant, marked "1" filed January 29th, 1901, mentioned at page 59, and in the particulars specified in the agreement between counsel at page 111 of this transcript), of the proceedings had in the civil district court of the parish of Orleans, in a certain suit wherein The New Orleans Gas Light Company was plaintiff, and The Drainage Commission of New Orleans, The Sewerage & Water Board, successor substituted, was defendant, and, also, of all the proceedings had in this honorable court on the appeal taken by said plaintiff, which appeal is now on the files thereof under No. 13,897.

Seal Supreme Court of the State of Louisiana.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said court, at the city of New Orleans, this seventh day of January, *anno Domini*, one thousand nine hundred and four, and in the one hundred, and twenty-eighth year of the Independence of the United States of America.

T. McC. HYMAN, *Clerk.*

There was no report of the drainage commission offered in evidence. The document called "specifications" the original of which is in the transcript is meant by the word report. The transcript is complete and so accepted by all parties to the record.

OMER VILLERÉ,
Att'y for S. & W. Board, Defendant.
BUCK, WALSHE & BUCK,
By CHARLES F. BUCK,
Att'ys for Pl'ff in Error.

116 *Chief Justice's Certificate.*

UNITED STATES OF AMERICA, }
State of Louisiana. }

Supreme Court of the State of Louisiana.

I, Francis Tillou Nicholls, chief justice of the supreme court of the State of Louisiana, do hereby certify that Thomas McCabe Hyman is clerk of the supreme court of the State of Louisiana; that the signature of Thomas McCabe Hyman to the foregoing certificate is in the proper hand writing of him the said clerk: that said certificate is in due form of law, and that full faith and credit are due to all of his official acts as such.

Seal Supreme Court of the State of Louisiana.

In testimony whereof, I have hereunto set my hand and seal, at the city of New Orleans, this seventh day of January *anno Domini* one thousand nine hundred and four, and in the one hundred and twenty-eighth year of the Independence of the United States of America.

FRANCIS T. NICHOLLS,
Chief Justice.

117 *Clerk's Certificate Legalizing Signature.*

UNITED STATES OF AMERICA,
State of Louisiana.

Supreme Court of the State of Louisiana.

I, Thomas McCabe Hyman, clerk of the supreme court of the State of Louisiana, do hereby certify that the Honorable Francis Tillou Nicholls, is and was at the time of signing the foregoing document, chief justice of our supreme court; and that the signature affixed to the same is in the proper handwriting of him, the said chief justice.

Seal Supreme Court of the State of Louisiana.

In faith whereof, I have hereunto set my hand and affixed the seal of this honorable court, at the city of New Orleans, this 7th day of January, *anno Domini*, one thousand nine hundred and four.

T. McC. HYMAN, *Clerk.*

118 Supreme Court of the United States, October Term.

NEW ORLEANS GAS LIGHT CO., Plaintiff in Error,
vs.
THE DRAINAGE COMMISSION OF NEW ORLEANS,
Defendant in Error.
No. 172.

It is hereby agreed by and between the undersigned respectively counsel for plaintiff and defendant in error in the above numbered and entitled cause pending in the Supreme Court of the United States that the clerk of said court omit in printing the record in said cause, that is to say from said printed record, the following documents to-wit:

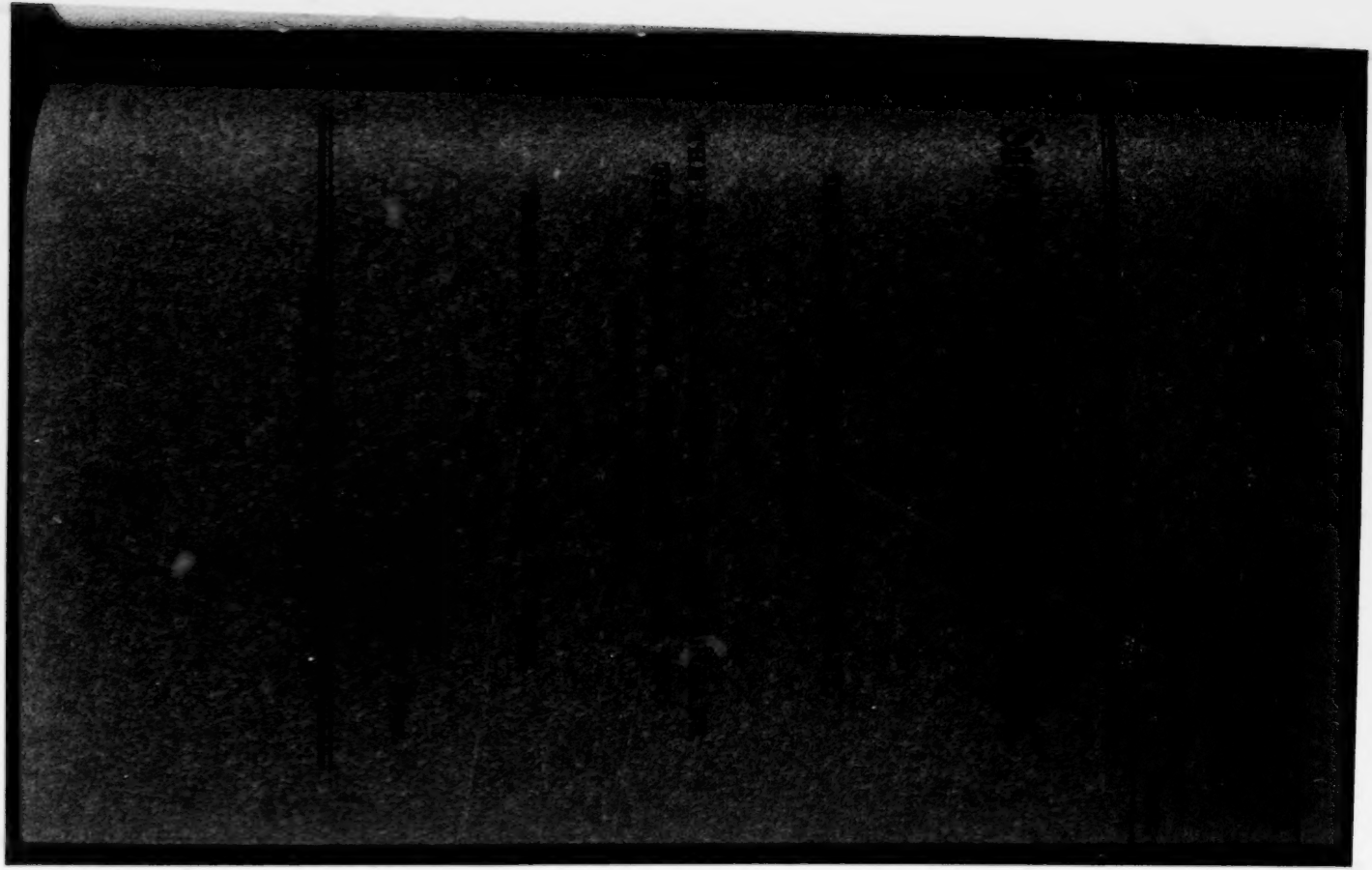
The large printed document offered by the defendant in error, being "specifications for the construction of a system of drainage for the city of New Orleans, Louisiana," the consent not to print said document in the record being made without prejudice to the right of either party to use or refer to same as part of the record in the Supreme Court of the United States.

CHAS. F. BUCK,
For Pl'ff in Error, &
OMER VILLERÉ,
Special Counsel.

SAM'L L. GILMORE,
City Attorney for Defendant in Error.

119 (Endorsed:) File No. 19195. Supreme Court U. S. October term, 1904 Term No. 172 The New Orleans Gas Light Co., P. E., *vs.* The Drainage Commission of N. O. *et al.* Stipulation to omit part of record in printing. Filed July 14, 1904.

Endorsed on cover: File No. 19,195. Louisiana supreme court. Term No. 172. The New Orleans Gas Light Company, plaintiff in error, *vs.* The Drainage Commission of New Orleans, the Sewerage and Water Board, successor, substituted. Filed January 12", 1904. File No. 19,195.



Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 172.

THE NEW ORLEANS GASLIGHT COMPANY,
PLAINTIFF IN ERROR,

versus

THE DRAINAGE COMMISSION OF NEW ORLEANS, THE SEWERAGE AND WATER BOARD, SUCCESSOR, SUBSTITUTED.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

I. HISTORY OF ORGANIZATION, FRANCHISES, ETC.

The New Orleans Gaslight Company, plaintiff in error, is, in all respects, the same and identical corporation, which was "plaintiff in error," in the case reported as "*New Orleans Gas Company vs. Louisiana Light Company*, in *115 U. S. 650.*

In that decision, pp. 651, *et seq.*, the history of its organization and the privileges and franchises with which it was endowed are minutely set forth.

It was originally chartered under the name and title of the *New Orleans Gaslight and Banking Company*, by Act of the

Legislature of Louisiana, passed April 1st, 1835. Section 2 of said act creates the corporation and Sections 36 and 37 define its franchises as a "Gas Company," in the following terms, to wit:

Section 36. "*Be it further enacted, etc.*, That the New Orleans Gaslight and Banking Company, their successors and assigns shall have and be entitled to the sole and exclusive privilege of vending gaslights in the city of New Orleans and its faubourgs, and the city of Lafayette, to such persons or bodies corporate who may voluntarily choose to contract for the same."

Section 37. "*Be it further enacted, etc.*, That in order to enable the said company to carry the foregoing section into effect they shall be authorized to lay pipes or conduits, at the expense of the company in any of the streets of said city and its faubourgs and the streets of the city of Lafayette, where the same may be required, in such manner as may produce the least possible inconvenience to the city or its inhabitants, etc."

By *Act No. 100* of the Acts of the Legislature of 1845, approved March 10th, 1845, the company was relieved of its obligations and franchises as a banking company, but all its franchises "to make and vend gas" were retained to be exercised under the name and title of "The New Orleans Gaslight Company."

Section 5 of said *Act of 1845*, page 60, provides for certain conditions under which the original charter was thus amended, as follows:

Sec. 5. "*Be it further enacted, etc.*, That the said New Orleans Gaslight and Banking Company shall execute a full release and discharge of all claims they may have against the Charity Hospital, and that during the continuance of the charter of the said New Orleans Gaslight Company, *they shall furnish the said Charity Hospital all the gas and fixtures necessary for lighting the same free of charge.*"

The corporate privileges and franchises thus conferred were to expire on April 1st, 1875.

By an *Act* of the Legislature, passed in 1860, this charter, in all its parts, was extended for twenty years. This *Act* was declared unconstitutional by the Supreme Court of the State in "Crescent City Gaslight Co. vs. N. O. Gaslight Co., 27 An. 138, and may drop out of consideration.

For convenience, the further developments in the history of

the plaintiff company, showing its charter and franchises as they now exist are respectfully submitted in the language of this Court in the case above referred to, *New Orleans Gaslight Co. vs. Louisiana Light Co., 115 U. S. Reports, pp. 652-653*, as follows:

"By an act approved April 20th, 1870, another company, under the name of the Crescent City Gaslight Company was incorporated. The charter provided that that company, its successors and assigns, should for *fifty years* from the expiration of the charter of the New Orleans Gaslight Company, have the sole and exclusive privilege of making and supplying gaslights in the city of New Orleans, by means of pipes or conduits laid in the streets, to such persons or bodies corporate as might voluntarily choose to contract for it. By a subsequent enactment in 1873, it was given authority to issue bonds to an amount not exceeding $1,000,000.00, secured by mortgage of its works and property, and it was declared that the charter of the New Orleans Gaslight Company should expire on April 1st, 1875, from which latter date and for the term fixed in the act of 1870, the franchise and privileges granted to the Crescent City Gaslight Company were confirmed.

"By a judgment rendered February 1st, 1875, in a suit brought by the Crescent City Gaslight Company against the New Orleans Gaslight Company, and which involved their respective rights to manufacture and sell gas in New Orleans, the Supreme Court of the State held that the former company 'has the sole and exclusive privilege to make and sell illuminating gas in the city of New Orleans for fifty years from 1st April, 1875;' also that the act of March 1st, 1860, extending the charter of the New Orleans Gaslight Company from April 1st, 1875, until April 1st, 1895, "is unconstitutional and void,' as having a title that did not declare the object of the act. The latter company was also enjoined from conducting business after April 1st, 1875, while the other company was confirmed in its exclusive right, after that date, to manufacture and distribute gas in New Orleans. *Crescent City Gaslight Company, vs. New Orleans Gaslight Company, 27 An. 138.*"

Thus, on or up to April 1st, 1875, there existed two companies—the original corporation created in 1835, with franchises expiring at that date, existing under the name and title "The New Orleans Gas Company"— and the "Crescent City Gaslight Company," created by acts of April 20th, 1870, and July 10th, 1873, the latter's franchises, "to make and sell gas," exclusive

as the former's, coming into existence on April 1st, 1875, as the former's expire, to be enjoyed for fifty years, viz: to April 1st, 1925.

Pending the case of Crescent City Gaslight Company vs. The New Orleans Gaslight Company, or immediately upon the rendition of the decision maintaining the charter of the former and declaring unconstitutional the extension of the charter of The New Orleans Gas Company, the two companies "consolidated on March 29th, 1875, in accordance with the provisions of the act of the Legislature of December 12, 1874, under the name of the New Orleans Gaslight Company. The validity and legality of this consolidation,—and the right to the "*exclusive franchise*" to manufacture and sell gas were the issues in the case from which above extract is quoted, 115 U. S., page 650. It was contended that the franchise "*was abrogated to the extent that it was made exclusive by that article of the Constitution of Louisiana of 1879 which, while preserving rights, claims and privileges then existing, provided that 'the monopoly features in the charter of any corporation now existing in this State, save such as may be contained in the charter of railroad companies, are hereby abolished.'' 115 U. S. 560.*

On both points the decision was in favor of the New Orleans Gaslight Company, confirming the validity of its corporate existence and its title to the exclusive franchises conferred by the Legislature in the various *acts* to be enjoyed until April 1st, 1925. These right have never been questioned since and are not questioned in this case.

[The decisions in the two cases,—115 U. S.,—and 27 An. 138—and all the *Acts* of the Legislature referred to. except the original *Acts* of 1835 and 1845, pertinent sections of which are herein above given *in extenso*,—having been offered in evidence in pamphlet form are contained in the printed Record, pages 34 to 82, inclusive.]

In the case of *Charity Hospital vs. New Orleans Gaslight Company*, 40 An. 382, the Supreme Court of Louisiana decided on issue made on the question, that the obligation to furnish gas free of charge to that institution, imposed by Section 5 of the

Act of 1845, was carried into the consolidated charter. At page 90, printed Record, is the statement of the President of the gas company showing the commercial *value* of gas consumed, "at regular rates," for the years from 1894 to 1900, inclusive,—seven years,—to amount to $38,481.75,—subject to a discount of 35 per cent., if paid within a time limit." The obligation to furnish gas to the Hospital runs with the charter to April 1st, 1925.

The Charity Hospital is a State institution—entirely maintained by the State, and the value of gas consumed, above given, enables us to form an estimate of the consideration, paid and to be paid to the State, for the franchises conferred on the company —plaintiff.

II. STATEMENT OF FACTS AND PLEADINGS.

The New Orleans Gaslight Company, plaintiff in error, exercised the rights and privileges thus conferred since the date of the original charter and since the reorganization, March 29th, 1875—without any question or interference.

About two hundred and twelve miles of "mains" have been laid throughout the city—(Testimony of Duncan Jones, printed Record, p. 23)—and, in the nature of things, the works are constantly expanding.

In the year 1893 the city of New Orleans, by various ordinances, began to agitate the question of providing for a general system of drainage:—various ordinances were passed (see printed Record, 83 to 89)—which culminated in the passage of Act No. 114 of the Legislature of Louisiana, of the Acts of 1896, practically adopting the plans proposed by the city, organizing a board called the "Drainage Commission," defining its powers, etc., etc.)

Section 8 of said Act is the only one which concerns us in this case and reads as follows:

SEC. 8. "*Be it further enacted, etc.*, That said commission

shall have power to employ such engineers and counsel as it may find necessary in the progress and execution of the work; *' and shall have the power to expropriate according to existing laws, by legal proceedings in its name and the right in all streets, and in and over all lands of the State and city in New Orleans or in the Parish of St. Bernard is hereby granted to said commission for any of its works.'* "

In due course of time the drainage work progressing came in conflict at various localities with the pipes and mains of the plaintiff company and the removal was demanded.

Thus an issue was created: the Gas Company contended, primarily, that its mains could not, under any conditions, be disturbed, but, in the alternative—quoting from the petition, printed Record, page 3.

Printed Record, p. 3—"That if it were true, as matter of law, that the objects for which the Drainage Commission was created, and the works which it had to construct, involved the exercise of an act of a high public nature, which would authorize the taking or damaging of private property, that such taking or injuring could not be consummated without compensation duly and previously made. And this contention led to an understanding between the parties, that in view of the difficult and hazardous nature of the work and the technical knowledge and skill requisite to its proper execution, plaintiffs herein, the New Orleans Gaslight Company, would do the work claimed to be necessary, change its mains, pipes and conduits in conformity with the plans made by the engineers of the Drainage Commission, keep a full and accurate account of the actual cost of such work, and that it, the Drainage Commission, would pay such costs."

This agreement was carried into effect; mains were taken up and relaid and various items of work done, from August 13th, 1898, to July 31st, 1899, when a statement of bills approved was rendered amounting to $2,481.38, which amount was duly paid.

Then a change came over the spirit of the commission and its legal advisor.

The agreement and payment had been under advice of counsel,—now a new position was taken: The commission claimed that it had acted under error of law as to its rights and powers and the rights of the State in the premises, and insisted that

where the mains and pipes of the plaintiff company were in the way of the drainage, they must be taken up and relaid at the expense of the Gas Company, the expense and injury inflicted or resulting to be suffered, without recourse, as *damnum absque injuria.*

Whereupon, again, for obvious reasons, in part set forth in the petition, a second agreement was entered into that the plaintiff company would continue to do the work as theretofore, keep strict account " and that the question of liability be submitted for adjudication to the courts of justice." When, under this arrangement a sum of four thousand and sixty-five 58-100 dollars had accrued, this suit was instituted.

These main facts, as well as the nature of the plaintiff-corporation, its rights, objects and franchises are set forth at length in the petition.

The petition concludes with the averment of liability for two specified " reasons " the one which concerns us in this Court being stated as follows:

"Second. If such work was necessary in the interest of a public work, still, acts done and rights claimed under pretended authority of said Act No. 114 of the acts of session of 1896, by the defendant, impair the obligation of the contract between the plaintiff and the State of Louisiana, in violation of Article I, Section 10 of the Constitution of the United States, and of Article 166 of the Constitution of this State; or said acts are and constitute a taking or damaging of private property for a public purpose, which carries with it and imposes the legal obligation to make 'just and adequate compensation for the injury inflicted by such taking or damaging.'

"And petitioner shows that Section 8 of said Act No. 114, which purports to give to such Drainage Commission the right to expropriate property—vests all the power and obligations of the State itself, in this regard, in said Drainage Commission, and imposes on said commission liability for property expropriated or damaged; and in so far as said Section 8 confers a 'right in all streets' in the city of New Orleans—such 'right' must be held to have been conferred subject to prior grants, and to the extent that this may be denied and absolute right claimed—said Section 8 especially is, as to petitioner, null, void and unconstitutional under said Article I, Section 10, Constitution of the United States, and Article 166 of the State Constitution."

Article 166 of the Constitution of Louisiana embodies the prohibition against the impairment of obligations and divesting vested rights.

Article 167 provides: "Private property shall not be taken or damaged for public purpose without just and adequate compensation being first paid."

The *Answer*, after setting up the "general issue"—practically admits the facts set forth in the petition and pleads the "powers" granted to the Drainage Commission, as recited above from Sec. 8 of the act: avers, that "*with reference to the accomplishment of the construction of said drainage system* (it) was vested *with the police power of the State*," the gist of defense urged being embodied in the concluding lines (Record, page 21), "that it had the right to require in the construction of this public work the plaintiff to so conform its mains and conduits as not to obstruct or impair the efficiency of said system."

The question of fact that the drainage works might have been constructed so as not to touch the mains of the plaintiff company, dropped out of the case, and we accept as the elemental premise for our legal structure the fact stated by the engineer of the Drainage Commission that the changes and removal of gas mains were necessary to carry out the plans and specifications for drainage.

In other words, it is conceded that a condition existed which would have warranted the State of Louisiana or a duly authorized sub-agency, in the exercise of "Eminent Domain," to enforce a removal of the mains and pipes of the Gas Company from one location in the street to another, on payment of just and adequate compensation.

The Court of original jurisdiction rejected plaintiff's demand. P. R. 92. On appeal, the Supreme Court of the State reversed this judgment. *Opinion*. P. R. 96-99. On rehearing, *this* judgment was rescinded and final decree rendered affirming the original judgment rejecting plaintiff's claim. Mr. Justice

Breaux, the organ of the Court, on the first decision, dissenting. *Opinion.* P. R. 105-115.

The "Fourteenth Amendment" and Article 167 of the Louisiana Constitution, above cited, are not specifically referred to in the petition, but the issue arising under them is distinctly made in the plea that, if the acts complained of—if not literally an impairment of the obligation of the contract, "are and constitute a taking or damaging of private property for a public purpose, which carries with it and imposes the legal obligation to make just and adequate compensation for the injury inflicted by such taking or damaging."

The "assignment of errors," elaborating the points more specifically is, for convenience, submitted *in extenso:*

ASSIGNMENT OF ERRORS.

"The above plaintiff and plaintiff in error in connection with the petition for writ of error, makes the following assignment of error, which it avers are to be found in the opinion, judgment and decree of this honorable court:

I. "*That* the Supreme Court of the State of Louisiana erred in failing to hold and decide that the pipes and mains for delivery of gas to consumers as duly and legally laid under the 'streets and alleys' of the city of New Orleans, under and in express authority and permission of legislative grant embodied in the act of incorporation were and constituted a fixed and integral part of the necessary work, plans and machinery of the corporation plaintiff and were in their location and fixture vested rights and property under the charter which constituted a contract between it and the State of Louisiana protected from impairment by the provisions of Section 10, Paragraph 1 of the Constitution of the United States."

II. "*That* the court erred in holding that the violent or forced removal of pipes and the necessary and consequent relaying of same at great expense to supply gas to the public which the plaintiff company is bound to furnish on penalty of forfeiture of charter is not a 'taking and damaging of property.'"

III. "*That* the Honorable the Supreme Court of the State erred in holding that the State in the exercise of police power or reserved power of regulation directly or through the agency of a subordinate public corporation could take, damage or interfere with and affect damagingly the property of the plaintiff corporation without violating constitutional principles; or tak-

ing property without due process of law; or denying to plaintiff the equal privilege and protection of the law."

IV. "*That* the Honorable the Supreme Court of the State of Louisiana erred in failing and refusing to hold as claimed and contended for by plaintiff that the right of plaintiff in and to 'its mains and pipes' as laid in the streets, and to the undisturbed use and possession thereof as laid in accordance with the grant from the State was an absolute, indefeasible vested right constituting property of value which could not be appropriated, taken or damaged for a public purpose by the State—even under pretense of regulation or exercise of police power, except after legal expropriation in the exercise of the State's power of 'Eminent Domain'—for compensation previously made."

THIRD—THE ARGUMENT.

Preliminary to the argument let it always be remembered that the amicable arrangement to move the pipes and mains, reserving the question of liability at law to be settled in the courts, must not prejudice the position of plaintiff. The questions involved must, in fairness, be determined as if the issue were made in a legal proceeding anterior to the infliction of damage;—in other words, precisely as if plaintiff were seeking by injunction to prevent the acts contemplated unless compensation were made;—or as if the defendant were proceeding by mandatory injunction to compel the plaintiff to remove the mains and pipes while denying liability for the expense involved or the damage inflicted.

The case acquires some dignity and importance from the fact that while involving no new or unrecognized principles it certainly imposes the task of applying established rules to new and untried conditions:—unless, as is contended on behalf of defendants, that we have here nothing but an ordinary and common question of "regulation" of *the use of* public streets or highways before which all manner of private or special rights must pale their ineffectual pretensions.

It is not disputed that the *charter* of the New Orleans Gaslight Company is a *contract* between it and the State, the obliga-

tions "of which cannot be impaired by subsequent legislation. It is equally admitted that the corporation was chartered as a *quasi* public corporation for the performance of a public service.

If any question were made on these points it would be answered by the decision of this Court in *N. O. Gaslight Co. vs. La. Light and Heat Co., 115 U. S., 650.*

The decision in that case, the main contention in which was that by the Constitution of the State of Louisiana of 1879, the "monopoly feature" or "exclusive franchise" of the Gas Company had been revoked—determined, or rather accepted as indisputable premises, the two propositions, viz:

First. "That the manufacture and distributing of illuminating gas, by means of pipes or conduits placed under legislative authority, in the streets of a town or city, is a business of a public character." Page 658.

Second. "That a legislative grant of an exclusive right to supply gas to a municipality and its inhabitants, through pipes and mains laid in the public streets, * * * is a grant of a franchise vested in the State, in consideration of the performance of a public service,—and after performance by the grantee is a contract protected by the Constitution of the United States against State legislation to impair it."

With these fundamental propositions conceded, the concrete specific question in the case is reduced to one inquiry, whether the acts complained of impair the obligations of this contract; or whether they constitute a taking or damaging of private property for public use under conditions imposing the duty to make just and adequate compensation.

Since 1835 "mains and conduits" have been laid and used: at the date of trial about two hundred and twelve miles of such were under the streets of the city as part of the working-plant of the corporation, used without let or hindrance; laid under express authority and *mandate* of the charter subject only to the condition that they shall be laid "*in such manner as may produce the least inconvenience to the city and its inhabitants, and provided, also, that the company shall afterwards repair, with the least possible delay, the streets they have broken.*"

Section 9, Act of April 20th, 1870, P. R., page 36.

Nor is it claimed or pretended that there are any special reservations either in the acts of incorporation or the general statutes of the State subject to which such grants are taken; and so the contestation in its last analysis comes to the hard, cold, unvarished proposition that the State—for the State is the offender—claims that where the right to lay mains and pipes in the streets, under legislative authority, was granted—it was done with the understanding that they might have to be taken up and relaid in indefinite number of times if the State needed for some other purpose the particular locality where they were originally laid. The grant is given to lay these conduits—and they must be laid or the charter is forfeited—for ninety years:—but though given for ninety years the company, after seventy years of peaceable enjoyment, is told to take up these mains and lay them "elsewhere"—in the street—only to be disturbed again next year!

For the right to compel us to move them once implies the right to move them constantly, and the right to move the length of a mile implies the right to move the entire system.

This may not be logic, but it is stubborn fact, and may well suggest the inquiry, whether the State conferred its authority with a reservation destructive of the thing she granted—and whether the grantee would have accepted the grant if it had so understood its limitation.

What does the "franchise" consist of but the right to lay mains? The mere right to manufacture and sell and deliver "gas" is not a franchise.

If gas could be delivered like beer or milk or water, no one would need a "franchise" or permission to make and sell it.

Obviously, then, the right to lay "mains and conduits" is the very life and soul of the body without which there would be no franchise at all;—it is the "franchise" itself. In consideration of the grant of that franchise the State imposes its condi-

tions: the grant must be exercised and mains *must* be laid "wherever required;" that is, where the people demand it.

The grant limits the price at which gas shall be furnished and imposes as a further consideration the obligation to furnish gas to the Charity Hospital free of cost.

Where, then, do the contract-rights of the plaintiff begin and end? Is it not a part of the contract that the mains when lawfully laid are laid in accordance with the grant and must be protected as such?

The Supreme Court of Louisiana maintained in the decision first rendered the right of plaintiff to receive compensation.

It considered the right of the plaintiff in its mains and conduits and their protection, a private property right which could neither be taken or damaged without compensation, under pretense of exercise of the police power and brought the case distinctly under the provisions of Art. 167 of the Louisiana Constitution which provides "that private property shall not be taken or damaged for a public purpose without compensation." P. R., pp. 98, 99.

The rehearing was granted—and the first decree rescinded and annulled on propositions, and a line of reasoning which, with due deference to that august tribunal, must expose to this Honorable Court the fallacy of the entire defense.

The opinion adopts two propositions, urged by counsel for defendant, as basis for its decision, viz:

First. "That the Gas Company had only the right of user in the public streets along with all other citizens, and acquired no right of ownership or 'property' in or to any part of the public streets by virtue of its charter 'provisions.' (2 Dillon Mun. Corp. 3d Ed. 683)."

(A reference to this citation will show that it deals entirely with the surface use of streets as public highways.)

Second. "That it took this right of user, subject to the implied condition that the State or the city might, in the exercise of its police power for the public health or the public safety, cause other structures to be placed in or on such streets which might

temporarily inconvenience the Gas Company in its use, or which might occasion *the removal to another* part of the street of its mains and pipes, and that any damage resulting from such temporary inconvenience or such removal was *damnum absque injuria.*"

The court accepted the correctness of these propositions and reversed its former decree.

Every constitutional safeguard—every principle of justice or obligation to the complainant company is swept away and she is treated little better than a trespasser.

Let us see, now, if such be "the law of the land." Let us see if the "police power" is so almighty and irresponsible, that it may sweep away as mock "divinities," the sacred rights which "hedge in," the security of the enjoyment of life, liberty and property. Blessed be the land where such things cannot be and hallowed the principles woven in the fundamental basis of our government which reject such heresies as injustice and spoliation!

The rights of the plaintiff company are of a surer and more permanent character than a mere license, a "user" at the pleasure of the sovereign.

This Court, in 115 U. S., held them to be of more substantial stuff. Differentiating the rights of the New Orleans Gaslight Company from the principles of *Beer vs. Massachusetts; Fertilizing Company vs. Hyde Park; Stone vs. Mississippi; Butcher's Union vs. Crescent City Live Stock Company;* to which might be added the later case of *Mugler vs. Kansas City,*—this Court, quoting from page 669, said:

"It is fairly the result of those cases, that statutory authority given by the State to corporations or individuals to engage in a particular private business attended by such results while it protects them for the time against public prosecution, does not constitute a contract preventing the withdrawal of such authority, or the granting of it to others."

"The present case involves no such considerations. We have seen the manufacture of gas and its distribution for public and private use by means of pipes laid, under legislative authority, in the streets and ways of a city, is not an ordinary business in which every one may engage, but is a franchise belong-

ing to the government, to be granted, for the accomplishment of public objects, to whomsoever, and upon what terms, it pleases. It is a business of a public nature, and meets a public necessity for which the State may make provision. It is one which, so far from affecting the public injuriously, has become one of the most important agencies of civilization, for the promotion of the public convenience and the public safety."

The contention that the "Gas Company" has only the right of user in the public streets *along with all other citizens*, is manifestly fallacious and evasive of the special issue, resulting from the fact that the Gas Company has been granted a right of use in the streets for a special purpose, and not a right of user *in* the street "*along with all other citizens.*" But again, this high tribunal has given its interpretation of the nature of the right granted, and we again let the Court speak in its own language. At page 659,. 115 U. S., it quotes from the opinion in New Orleans vs. Clark, 95 U. S., as follows:

"A private corporation, as well as individuals, may be employed by a city in the construction of works needed for the health, comfort and convenience of its citizens; and though such works may be used by the corporation for its own gain, yet as they advance the public good the corporation may be properly aided in their construction by the city, and for that purpose its obligations may be issued, unless some constitutional or legislative provision stands in the way."

Here, may it not be asked, if the establishment of a gas company—for such was the issue in the case from which the citation is made, is of such public character that the State, or one of its subordinate agencies may issue its bonds in support of the enterprise, may it not, with equal consideration, grant fixed and permanent privilege to use some of the public property—the streets, for instance,—to carry out the same purpose?

This Court, after citing the passage above quoted, proceeds:

"Legislation of that character is not liable to the objection that it is a mere monopoly preventing citizens from engaging in an ordinary pursuit of business open as of common right to all, upon terms of equality; for, the right to dig up the streets and other public ways of New Orleans, and place therein pipes and mains for the distribution of gas for public and private use,

is a franchise, the privilege of exercising which could only be granted by the State, or by the municipal government of that city acting under legislative authority. Dillon's Municipal Corporation 3d, Sec. 691; State vs. Cincinnati Gas Company. 18 Ohio State, 262; see, also, Boston vs. Richardson, 13 Allen, 146."

"To the same effect is the decision of the Supreme Court of Louisiana in Crescent City Gaslight Company vs. New Orleans Gaslight Company, 27 La. An. 138, 147, in which it was said: 'the right to operate gas works, and to illuminate a city, is not an ancient or usual occupation of citizens generally. No one has the right to dig up the streets and lay down gas pipes, erect lamp posts and carry on the business of lighting the streets and the houses of the city of New Orleans without special authority from the sovereign. It is a franchise belonging to the State, and in the exercise of the police power, the State could carry on the business itself or select one or several agents to do so."

Clearly, then, the plaintiff in error has something more than "a right of user in the public streets along with all other citizens:" it has a *special right* lawfully granted by the sovereign, of which it cannot be deprived except through the exercise of the power of eminent domain,—nor seriously damaged by a "taking" for another public purpose without compensation.

The precise issue made in this case has been decided by the Circuit Court of the U. S., Fifth Circuit, Eastern District of Louisiana, Judge Pardee, presiding. The New Orleans Waterworks Co.—a corporation not unknown in the records of this Court—is under administration of a Receiver, appointed by that Court in case entitled "*Moore vs.* N. O. Waterworks Co. The Waterworks Co. had entered into an agreement with Drainage Commission, identical in terms and effect with that made by the Gas Company. The *Receiver* appointed refused to be bound by the agreement, and in the form of an application to the court for an injunction to restrain the Drainage Commission, made the issue. The Court granted the injunction. 114 Fed. Rep., pp. 382-83.

The learned Judge analyses the contentions presented on behalf of the Drainage Commission briefly, but with marked comprehensiveness. He finds that there "is a taking or damaging of private property for a public purpose," in the sense of

the article of the Constitution and quotes the language of this Honorable Court, in *Chicago B. & O. R. R. Co. vs. City of Chicago, 166 U. S. 226*, to the effect that "since the adoption of the Fourteenth Amendment, compensation for private property taken for public uses constitutes an essential element 'in due process of law,' and that without such compensation the appropriation of private property to public use, no matter under what form of procedure it is taken, would violate the provisions of the Federal Constitution"

The learned Judge, after citation of this and other authorities, formulates his conclusion as follows:

"In the light of these authorities, and under the facts of this case, I am disposed to hold at this time and for this case, that the police power of the State, so far as vested in the Drainage Commission under the legislation which creates the commission, goes to the extent of, and no further than the right to the joint occupancy of the streets of the city with the Waterworks Company, and the right to remove and replace, provided the same can be replaced, the mains and pipes of the Waterworks Company wherever necessary to secure such joint occupancy and construct works in accordance with the plans for drainage adopted by the city; but that so far as it may be found necessary in prosecuting the drainage work to appropriate, expropriate, take or damage the property of the New Orleans Waterworks Company, including the removal and replacing of waterworks, mains and pipes, it can only lawfully proceed by previously making just and adequate compensation."

The case confidently relied on by the defendant and quoted in the decision of the Supreme Court of Louisiana, of "*National Waterworks Company vs. City of Kansas*, (G. C.) 28 Fed. Rep. 921—" is thus differentiated by the learned Judge from the present case:—In that case (quoting)—"there was no such contract as here and there was a reservation in favor of the city as to the designation of streets or where pipes might be laid." Page 382.

It might be added to this that the learned Judge (Mr. Justice Brewer) placed his decision on the authority of the Slaughterhouse cases, 16 Wall. 36, and Butchers' Union vs. Crescent City, 111 U. S. 746, which cases were distinctly held by this Court in 115 U. S., above cited, to rest upon principles not in conflict with the grant of an *exclusive privilege* to a gas company.

It is difficult to subdivide the argument under the two-fold plea that the plaintiff is protected by both the provisions prohibiting impairment of obligations, *Art. 1, Sec. 10, Paragraph* I, and by the principle of the *Fourteenth Amendment* embodied in the Art. 167 of the State Constitution, against the taking or damaging of private property for public use without compensation.

Without extending the discussion too much into collateral questions, it may be assumed that the latter provisions are an extension of the rights guaranteed to private property as against the public beyond those secured by the prohibition against the impairment of contract obligations.

We invoke the contract as the source and evidence of our title to lay mains in—or rather, *under* the streets, and that when so laid, and as laid, they constitute the company's private property, invested with all the elements of ownership and subject only to the general burdens imposed on all property in the State. And being private property it cannot be taken or damaged without violating either the contract rights of the company or the general principles of the Fourteenth Amendment, under which a taking or damaging of private property for a public purpose without compensation is held to be a taking without "due process of law."

To inform the court to what extent the textual provisions of the *Civil Code* of Louisiana recognize the rights of private ownership, we submit the following articles, cited by Boarman, J., in Hollingsworth vs. Parish of Tensas, 17 Fed. Rep. 109, in which he held, "that private property cannot be taken, appropriated or damaged for public use through the exercise of the single principles of Eminent Domain, which, in all cases, carries with it the right of just indemnity."

He cited Art. 2604. "The first law of society being that the general interest shall be preferred to that of individuals, every individual who possesses, under the protection of the laws, any particular property, is tacitly subjected to the obligation of yielding it to the community, whenever it becomes necessary for the general use."

Art. 2605. "If the owner of a thing necessary for the general use refuses to yield it, or demands an exorbitant price, he may be divested of the property by authority of law."

Art. 2606. "In all cases a fair price should be given to the owner for the thing of which he is dispossessed."

Art. 489. "No one can be divested of his property unless for some purpose of public utility, and on consideration of an equitable and previous indemnity and in a manner previously prescribed by law."

Art. 2294. "Every act whatever of man that causes damage to another obliges him by whose fault it happens to repair it."

Art. 156, Const. La., 1879. "Private property shall not BE TAKEN OR DAMAGED for public purposes without just and adequate compensation being first paid." (Now *Art. 167, Const. 1898.*)

THE LAW AND JURISPRUDENCE APPLICABLE TO THE CASE.

The issue, besides the question of *impairment of contract-obligations*, turns on whether we here have a "taking or damaging" for a "public purpose," or a mere matter of "general regulation."

Let the authorities speak for themselves:

The case of *Chicago vs. Taylor*, *125 U. S. 161*, furnishes an initial analysis to the discussion because it seems to be the first case in which an enlarged provision of the Constitution of Illinois was applied,—viz: "that private property could not be taken *or damaged* without compensation."

The provisions in various State Constitutions embodying compensation for *damage* are the product of recent developments,—Louisiana did not have it in her Constitution until 1879—retained in that of 1898.

Illinois adopted it in 1870 (quoted in Taylor case) enlarging the text of prior Constitutions which gave compensation only for property "taken or applied to public use."

I respectfully submit in this connection that, while as matter of jurisdiction or final decision, it may be contended that this Court will follow the State Court decisions on construction of the

State Constitution, the articles in a State Constitution considered in *Chicago vs. Taylor*, and part of the organic law of Louisiana, merely gives expression to the principle embodied in the Fourteenth Amendment and the conditions which would authorize relief in one case would secure it in the other. Therefore, an *authority* on the scope of such provision in the State Constitution is an authority to this Court for the exercise of its judicial power to enforce the guarantees of the Fourteenth Amendment.

Under the Constitution of Illinois, in force prior to 1870, there could be no recovery for "consequential damages resulting from changes in streets," etc.—but in the case cited the U. S. Circuit Court awarded damages under the said enlarged provision of the Constitution and the judgment was affirmed by this Court.

In that case, as in this, the defense was "regulation" of public highway under the police power—*damnum absque injuria.*

The questions are elaborately discussed and clear conclusion reached that where one, from the prosecution of a public work suffers a "special injury" in excess of the injury done to others"—(page 165),—he has a cause of action. As indicative of the scope of the case, the following is submitted, from p. 166:

"The new rule of civil conduct, introduced by the present Constitution, the court adjudged, required compensation in all cases where it appeared there has been some physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally."

The final result is expressed in the syllabus:

"Under the provision in the Constitution of the State of Illinois, adopted in 1870, that 'private property shall not be taken or damaged for public use without just compensation,' a recovery may be had in all cases where private property has sustained a substantial injury from the making and use of an improvement that is public in its character; whether the damage may be direct, as when caused by trespass or physical invasion of the property, or consequential as in a diminution of its market value."

As embraced in certain propositions laid down by the Supreme Court of Oregon, in *Little Nestucca Road Co. vs. Tulmock County, 31 Oregon, 1,* attention is called to the fact that we have in this case a "public purpose or utility" coming in conflict with a previously established concern of equal public purpose and character. The authorities are to the effect, that one cannot be destroyed to give way to another without compensation, and *statutes* authorizing such taking are unconstitutional. *Southwestern R. R. Co. vs. Southern, etc., Tel. Co., 46 Ga. 43;* Connecticut River R. R. Co. vs. County Commissioners, 127 Mass. 50; in *Nestucca Road,* etc., cited above, 31 Oregon, 1, following propositions asserted and approved:

"The right to take lands already appropriated to one public use for the purpose of appropriating them to another exists only where there is a statute clearly conferring such authority. A statute authorizing the laying out of a public highway does not justify taking therefor lands previously devoted to some other public use."

"The taking of lands already devoted to one public use and appropriating it to another may be authorized by the Legislature, but the authority must be conferred by express terms or arise from necessary implication."

"*Property already devoted to one public use cannot be taken for another without first making compensation to the persons interested in the previous public use. Hence, lands used as a public toll road, cannot be taken for public highways free from such tolls, unless the owners of the toll road are compensated for moneys expended by them in acquiring the right of way and in making improvements.*"

In *County of San Mateo vs. So. Pacific. Co., 13 Fed. Rep. 733,* it is held that:

"Under the reserved power to amend, alter or repeal the laws under which private corporations are formed, 'the State cannot exercise a control over the property of a corporation, except such as may be exercised through control of its franchises, and over like property of natural persons engaged in similar business. It cannot divest property or rights which have become vested.'"

In *Rutland Electric Light Co vs. Marble City Co.,* 65 Vermont, 377, 36 American State Reports, page 868, the Supreme Court of that State decided:

"When a city conferred on an electric light company the right to erect its polls on certain streets, and the company, relying upon the license thus given, expends money in establishing its plant and appliances, the city cannot, by a subsequent ordinance, infringe on the rights thus vested, or bestow on another company the authority to infringe them."

The court cites Hudson Tel. Co. vs. Jersey City, 49 N. J. L. 303, where it was held "that where the city, under statutory authority had designated certain public streets in which the company might place its telegraph poles, and the company had expended money in placing its polls upon such streets, the city could not, by subsequent ordinances, revoke such designation; *that the company had an irrevocable vested right to use the streets for the designated purpose.*"

In *Fidelity Trust Co. vs. Mobile Ry. Co.*, Fed. Reporter, 687, it was held that a franchise to operate a street railway could not be interfered with; that the "dispossession" of any portion thereof was a taking of the franchise, *pro tanto*, etc.

In *Clarksburg Electric Light Co. vs. Clarksburg*, 50 Lawyer's Rep., annotated,—page 142, it was held "that a grant of use of streets for conveyance of electric light is a contract protected by constitutional provisions from impairment."

In the *note* to that case—page 142—closing at 151,—numerous decisions are reviewed, the substance of which is thus summarized:

"The conclusion from all the authorities seems clear, to the effect that a franchise or privilege to use streets for any of the various *quasi* public purposes, above considered, will constitute an irrevocable contract, unless there is, in some form, a clear reservation to cancel or revoke it."

And in point,—*Louisville Gas Co. vs. Citizens' Gas Co., 115 U. S. 683;* Chicago Gas Co. vs. Lake, 130 Ill. 42; Indianapolis vs. Consumer Gas Co., 140 Ind. 114.

In matter of "*Sixth Avenue Railway*," 72 N. Y. 330, it was held that the right of a street railway company to the use of a street for the purposes of its business is a property right and can only be taken under condemnation for public use and compensation made and embodying the idea of a partial damage only by allow-

ing another railroad to run upon the street or another company to run its cars on the same track, the Court said:

"The State in the exercise of the right of Eminent Domain, or a corporation to whom it has delegated the right, is not bound to take the entire estate and strictly should take only such an interest as is necessary to be acquired to accomplish the public purposes in view."

Judge *Dillon*, "Municipal Corporations," 3d Ed., Vol. II, *Section 588*, page 582, lays down the following propositions as embodying the established jurisprudence, to-wit:

"1 That the Legislature may, in the exercise of the right of Eminent Domain, deprive corporations of their property and franchises upon making compensation; but this can be done only under power to that end specially or expressly granted.

"2. If a corporation holds land or property as a private proprietor, and not for public uses, this may be taken under the power of Eminent Domain the same as if owned by an individual.

"3. But lands held by corporation upon a special trust for public use, and thus used, cannot be compulsorily appropriated to another public use without special authority from the Legislature.

"4. And hence a corporation cannot, under a general power, to condemn property for public use, take from another corporation having like power, property held by it, under legislative authority, for public purposes, although it may, it seems, under such general power, acquire an easement in *invitum* in such property when this can be done without doing injury to the public, or essentially interfering with the uses for which it was acquired and is held by the corporation which owns it."

The Supreme Court of this State,—Louisiana, held in *Irvin vs. Tel. Co., 37 Ann. 63*, that where some one person, or some particular persons suffer a special damage from the enforcement of a police regulation,—"not common to all other persons," they would be entitled to compensation for such *special injury*.

We find in *Glover us. Powell*, 10 N. J. Eq. 211, a case identical in principle with this case.

In remote "colonial days"—1760,— under legislative permission certain proprietors of meadow land subject to overflow along a small water course "where the tide ebbed and flowed" constructed a dam, thereby reclaiming the lands;—the parties

in interest were practically constituted a quasi-corporation with power of control to levy assessments, etc., and the dam was so maintained until 1854 when the Legislature, for purposes of public use of the stream, passed an act directing the demolition or removal of the dam.

An injunction was issued and made perpetual and maintained on the grounds, 1st, *that the dam was constructed under conditions constituting a contract protected by the Constitution of the United States.*

2d. *That the Act of 1854 was repugnant to the State Constitution which declares "that private property shall not be taken for public use without just compensation*

I quote from the text:

"Under the provisions of the act of 1760, rights have become vested and valuable property, has been acquired. These powers and this property have been enjoyed under the protection of this act for nearly a century past. The State has participated in the benefits conferred. The property acquired under the act has been taxed for the support of the State and municipal governments. It is in violation of good faith, it impairs the obligation of a contract which has been enjoyed to the mutual benefit of both parties, and it is, therefore, repugnant to the Constitution of the United States."

"The act of 1854 is also repugnant to the Constitution of the State of New Jersey, which declares private property shall not be taken for public use without just compensation. * * *

"The dam and water works in question are private property. They have been constructed, maintained and paid for by the owners of the meadow along the creek. They have been acquired under the express sanction of law. The value of the meadow is destroyed by the execution of the law in question, and thus may be said, with propriety, to be taken from the owner. A partial destruction—a diminution of the value, is a taking of private property."

In *Fidelity Trust Co. vs. Mobile Ry. Co.*, 53 Federal Reporter, 687, it was held that a franchise to operate a street railway could not be interfered with; that the "dispossession" of any portion thereof was a taking of the franchise, *pro tanto*, etc.

The rules and principles affirmed and established by these *authorities* will appear more effective as we approach the specific treatment of the

POLICE POWER

AND THE QUESTION OF

WHAT CONSTITUTES A TAKING OR DAMAGING.

The police power, whatever it may be in nature and scope, is subordinate to the Constitution. As said in "*The matter of application of Jacobs,*" 95 N. Y., page 98:

"The limit of the power cannot be accurately defined and the courts have not been able or willing definitely to circumscribe it. But the power, however broad and extensive, is not above the Constitution. It furnishes the Supreme Court the guide for the conduct of legislators, judges and private persons and so far as it imposes restraints the police power must be exercised in subordination to it."

Waiving, therefore, a discussion of what the police power is—indeed, confessing utter inability to undertake to define it, yet venture as preliminary to the inquiry as applicable to this case, the proposition that the acts complained of, and causing the damage to the plaintiff are not founded upon an exercise of the police power in its usual and most proper scope. Primarily, as we have seen, the police power is a power of 'regulation' only; enforcing in its simplest and yet widest operation the rule that every man must so use his own as not to injure others.

It would seem work of supererogation, before this tribunal which has so often considered questions of conflict between private rights and the police power of the State to discuss the matter originally.

The line has been distinctly drawn to the effect that the police power cannot be pleaded to justify damaging or taking of private property engaged in a lawful purpose authorized by the State.

The distinction is emphasized in Gas Company case, 115 U. S., where the scope of the great cases already referred to preceding it is defined and limited.

The same reasoning disposes, as inapplicable to the issue in this case, of the case of *Mugler vs. Kansas City*, 123 U. S., page 623.

Stated in its clearest and most concrete form, the complainants in these cases were denied relief or compensation,—held to be *outside* of constitutional protection,—because engaged in business inherently obnoxious, or injurious physically or morally, therefore subject at all times to the police power as the power reserved to the State to protect "the health, the morals and the safety of the community." The conclusion is stated in direct and unambiguous terms:

> "*The destruction in the exercise of the police power of the State, of property used in violation of law, in maintaining a public nuisance is not a taking of property for public use and does not deprive the owner of it without due process of law.*"

Indeed, these cases deal with conditions peculiar to themselves defining distinctly and unmistakably a particular rule or principle applicable to them alone and removed as far as night from day from the conditions under which, as in this case, the question to be determined is the application of constitutional provisions to the "taking" or "damaging" of private property lawfully owned and lawfully used for a purpose expressly authorized by law!

That line of decisions culminating in Mugler vs. Kansas City, really has no application to the case at bar and should be eliminated from consideration.

When an attempt is made to take such property from its owner, for a public purpose, other principles interpose their veto and proclaim that "it shall not be done without just and adequate compensation."

The authorities already cited confirm this proposition.

In addition, reference to authorities in which the conflict between the "police power" and the "Constitution" is expressly involved follow:

Mills, "*On Eminent Domain*, Section 7, deals with the question how property may be taken or affected by the exercise of the police power. There is no general principle laid down; the illustrations confirm the contention which we endeavor to maintain that 'regulation' can only be permitted to operate generally and equally,—except where it suppresses a specific 'nuisance' or deals with a matter *per se* offensive to health, comfort or morality, etc., as illustrated in the Slaughter House Cases, 16 Wall. 36; in Hyde-Park Case, 97 U. S.; Beer Co. vs. Massachusetts, and other similar cases.—

In *Section 44* he lays down a rule deduced from cases cited to the effect that a street railway franchise cannot be destroyed in part by allowing a second line of cars to be run over its tracks without compensation.

ELLIOT, "On Roads and Streets" *Section 20, page 897*, under the heading "*Limitations of Police Power*, "*Vested Rights*,"—says:

"But the police power is not unlimited, and while rights to use streets for electric wires and poles are taken subject to that power, neither the State nor its municipalities can destroy contracts and vested rights by improper regulations and enactments under the guise of the exercise of the police power. *It is generally held that a right granted by a municipality, by ordinance for a valuable consideration, constitutes an irrevocable contract, at least where it is accepted and acted upon by the grantee, and money is expended upon the faith thereof.* In such cases the vested right and the obligation of the contract cannot be materially impaired by attempting to withdraw the consent of the municipality, or imposing other conditions not contemplated by the contract or law and not properly police regulations."

And see *Cooley*, "On Constitutional Limitations," 3d Ed., page 544.

In Chapter XVI, 3d Ed., page 572, *et seq.*, Judge Cooley defines elaborately and minutely the police power, especially in

regard to how it may affect the use and enjoyment of property. He shows distinctly, both upon his own authority and by reference to decisions, that the police power, properly so-called, is simply a power of "regulation,"—quoting extensively from the leading case of *Thorpe vs. Rutland R. R. Co., 27 Vt. 149,* for the purpose of defining what powers the State reserves and exercises over the use and enjoyment of all property in the interest of the protection "of the lives and limbs, health, comfort and quiet of all persons and the protection of all property within the State." His definitions and illustrations of what can be done under the police power,—as a power of regulation, nowhere touch the boundary of the domain within which this case lies. The construction of a system of drainage is not a work of "regulation:" it is the prosecution of a public work, for the public good, and therefore private property of any kind whatsoever may be taken or damaged—but such taking or damaging, inflicting a particular injury on the owners, falls under the protection of Art. 267 of the Constitution of the State—and compensation must be made. We think the authorities will confirm this pretension.

At page 576 he defines *the limit* of the exercise of the police power and shows how far it can go in its interference with rights of use and ownership of property. He says:

"The regulations must have reference to the comfort, safety or welfare of society; they must not be in conflict with the nature of the provisions of the charter (meaning a charter granted some corporation, such as that under which the plaintiff's rights are asserted in this case),—and they must not, under pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be 'police regulations in fact, and not amendments to the charter in curtailment of the corporate franchise.'"

The *author* deduces his conclusions from the decisions of courts of the highest authority, distinctly to the effect that even rights or works over public highways, when money has been expended and property invested, could not be taken in part or in

whole or damaged except under the exercise of the power of eminent domain and for compensation.

A citation from *Benson vs. Mayer, 10 Barb. 345*, in note at page 576, is particularly in point; also the reference to *Miller vs. N. Y. R. R. Co., 21 Barb. 513*, where it was held that, notwithstanding a reservation of a right to amend or repeal a charter or franchise, a railroad company which has constructed its tracks, appurtenances, etc., could not be compelled to allow a proposed new street or highway to be taken across their track and to be made to construct at their own expense the necessary embankments, excavations and other work to be done for that purpose; thus "not only appropriating a part of their property to another public use, but compelling them to fit it for such use." Throughout the chapter the distinction between regulation, and an attempt to affect vested rights or damage property is strictly maintained and the different line of authorities shown to determine the rights and obligations in the two different directions. The author quotes at length the opinion of *Chief Justice Redfield*, in the case above referred to, from the *27th Vermont*, as showing distinctly what is meant by, and the extent of, the police power for *purposes of "regulation,"* contrasting the exercise of that power with that under which some particular prior right or grant is to be impaired or affected.

Alfred Russel—"The Police Power," page 25, evolves the following definition of the police power:

"It in general covers the conduct of individuals and the use of property and includes the regulation of these subjects of the State," and at page 86 he says:

"Where property is taken in that way for public health or safety, in general it cannot be taken without compensation and there is no distinction in this regard between the power of Eminent Domain and the police power. The police power restricts the use and enjoyment of property; the power of Eminent Domain promotes the public welfare by taking property from the owners and applying it to some public use. Prohibitory liquor laws have been universally upheld and sustained under the police power, in several States,—but, as already ob-

served, there cannot be under this power the appropriation of property without compensation, for public health or safety."

Matter of Cheseborough, 78 N. Y. 332.

Cavanagh vs. Boston, 139 Mass. 426.

From Lewis, "On Eminent Domain:"

Section 35. "The property in connection with which the franchise is made available and the franchise itself are, of course, subject to the power of Eminent Domain like all other property."

"When a part of the property or the whole property is taken for public use, there is no doubt as to the nature of the act or the right to compensation."

Section 56. "When the property is only *damaged*, the damage must be the result of a violation of some one or more of the rights which constitute property—'the unrestricted rights of use, enjoyment and disposal.'"

"In other words, the damage must be actionable damage, that is, damage which would be remediable if done by an individual without any pretense of statutory authority."

Freund, "On Police Power,"—a recent work, *Section 513,* defining how property may be affected by the police power, says:

"The normal form of impairment of property rights under the police power is restraint or regulation which leaves property physically intact and merely compels owner to exercise his right over it in a certain manner." * * *

"Restrictive "regulation" is regularly imposed without compensation."

In *Section 515* "regulation" is distinguished from "taking."

Section 555, page 582 * * * "the provisions of the Constitution against the impairment of contract obligations restrict or may restrict the exercise of the police power."

Section 577, page 601, citing 3 Wallace, 51, he says:

"An exclusive franchise granting special rights in public property (laying of pipes, maintenance of a bridge) may be made the subject of a contract and of an irrevocable grant and is protected against subsequent competing grants by the Federal Constitution."

In *Detroit vs. Detroit Citizens' St. R. W. Co., 184 U. S. 868,* this Court said:

"The issue being an attempt on the part of the city of Detroit to reduce the rate of fare, fixed in the original contract, under pretense of the exercise of the reserved 'right to prescribe from time to time the rules and regulations for the running and operation of the road.'"

"That such contract, having once been made, the power of the City over the subject so far as altering the rates of fare or other matters properly involved in and being part of the contract, is suspended for the period of the contract."

In the *Railroad Tax Cases*, 13 Fed. Rep. 755, the "reserved powers of the State over franchises and property of corporations," *i. e.*, public corporations—is elaborately discussed. A distinction is drawn between the right to repeal (if the right is reserved) the *incorporation*—and right over the property of the corporation leading to the conclusion, that:

"The property of the corporation acquired in the exercise of its faculties, is held independently of such reserved power and the State can only exercise over it the control which it exercises over the property of individuals engaged in similar business."

Lewis, "On Eminent Domain," *Section 153*, cites *McCauley vs. Waller, 12 Cal. 500*, to the effect that "*a leasehold in public property, derived from the State cannot be recalled or destroyed without compensation.*"

"*The Binghamton Bridge*" *case, 3 Wall. 51*,—is strongly in point. An enactment creating a corporation with privilege to erect a toll-bridge, and providing that no person shall erect any bridge within two miles on either side—was held a contract protected by the principle of the Dartmouth College case. The prohibition was held to extend to the State. To the same effect is *Bridge Proprietors vs. The Hoboken Co., 1 Wall. 116.*

In *Section 602*, summary of principles regarding how property may be affected by the police power, the author lays down, among his conclusions the following:

No. 1. "The purposes for which the police power may be exercised do not justify the taking of *lawful* property without compensation." * * * * * *

No. 7. "A lawful trust cannot be impaired unless it is organized under a charter which is subject to a reserved power of alteration or repeal."

The Supreme Court of Louisiana, though it denies relief in this case, is not a stranger to this principle; the difference is only in the application. We find them recognized in *Irvine vs. Tele-*

phone Co., 37 An. 63; in *Shreveport Railway Co. vs. St. Louis R. R. Co., 51 An.*, page 814, and in *Railroad Co. vs. Levee Board, 49 An. 570*, where it is said in terms:—"*the right to compensate for property taken for public use, is not to be denied on the ground that the expropriation is the exercise of the police power.*"

Finally, under this head, and as authority on the contention that we have a case of direct impairment of contract obligations the case of *Western Union Tel. Co. vs. Wyatt, 98 Fed. Rep. 335*, is cited. It is there laid down in comprehensive terms that "the power of a State to control public service corporations" * * "is subject to the constitutional limitations designed to protect property against oppressive action by the State amounting to a deprivation of such owners of their property without compensation or without due *process of law.*"

IS THE ENFORCED REMOVAL AND RELAYING OF THE MAINS OF THE PLAINTIFF COMPANY A "TAKING" OR "DAMAGING" OF ITS PRIVATE PROPERTY?

It involves, clearly, an impairment of the contract: it is equally a taking in the sense of the justice of the law as embodied in Art. 167 of the State Constitution and the Fourteenth Amendment.

The principles vitalized in these enactments merely express what the common law of England secured to the people centuries ago. We have the emphatic testimony of Blackstone to this effect.

Blackstone's Commentaries, Vol. 1, page 139.

"So great moreover is the regard of the law for private property that it will not authorize the least violation of it: no, not even for the general good of the whole community."

"* * * When property is taken it is not done by '*stripping the subject of it in an arbitrary manner but by giving him a full indemnification—an equivalent for the injury thereby sustained.*'"

The equity to compensation even for consequential damages is recognized in some States by express legislation. It is so in New York and Massachusetts. *Freund*, "On Police Power," page 545.

Elliot, "On Roads and Streets" *Sections 202 and 203*, 2d Ed., announces unequivocally the conclusion that "*any subjection of land to an assessment or any burden incompatible with the dominion of the owner or the serious interference with the use and enjoyment of property will be deemed a 'taking' within the meaning of the organic law.*"

Again, *Freund, Section 507*, page 543:—"On principle there can be no difference between property taken for public use and injury done to private property in the course of a public undertaking."

In *Section 508* the conclusion is reached that the "*constitutional principle which forbids taking must always forbid injury without compensation.*"

Eaton vs. Boston R. R. Co., 51 N. H., page *504*, and the great case of *Tumpelley vs. Greenbay Co., 13 Wallace 166*, are cited: the latter to the effect that "it would be a curious construction of principles of justice and law to hold that property could be affected by the infliction of irreparable and permanent injury to an extent that in effect subject it to total destruction without making compensation because in the narrow sense of the word it is not a taking for public use."

On this case we greatly found our faith. It defines what constitutes "taking or damaging" and approves and consecrates the principle that private property can neither be taken for a public purpose nor consequentially or incidentally damaged in the execution of a public purpose without compensation.

This Court, conceding that in some of the State Courts it has been held that no recovery can be had "in such cases" for "consequential injury," say, at page 181 (13 Wall.):

"But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and in some cases beyond it, and that *it remains true* (our italics) *that where real estate is actually invaded* by superinduced additions of water, earth, sand or other material, *or by having any artificial structure placed on it* so as to effectually destroy or injure its usefulness, *is a taking* within the Constitution, and that this proposition is not *in conflict with the weight of judicial authority in this country, and certainly not with sound principle.*"

The conclusion reached in the case by this Court, as to the right to receive compensation where there is consequential dam-

age only or injury which does not amount to an "actual taking," is thus expressed in the concluding paragraph of *Section 510* at *page 545:* (Freund)—

"It is, therefore, not every inconvenience or depreciation of value caused by a public improvement for which the constitutional or statutory provisions in question give a right of compensation but only the impairment of some benefit which is so directly inherent to the property that it can be recognized as part of the legal right or as in the nature of an appurtenant easement the impairment thus constituting a legal injury."

Clearly, this rule, if it means anything, embraces in its scope this case. Is not the right to lay "conduits" through the public street the thing itself—the franchise?

Is not the right to use and enjoy these conduits when lawfully laid, as part of the "plant" necessary to carry out the object for which the franchise is granted, "so directly inherent to the property that it must be recognized as part of the legal right? It is the thing itself: the one single grant—besides the right to exist as a corporation, and if the State has the right to compel the taking up and relaying of mains—except by the exercise of the power of Eminent Domain for compensation,—for any purpose,—she can do indirectly what she is not permitted to do directly,—destroy the corporate business and property, by taking back the thing which she had granted and without which the operation of the business is impossible. This would lead to a conclusion repugnant to law and justice and therefore theoretically impossible.

This Honorable Court has more recently had occasion to deal with this question, especially in *Cotting vs. Kansas City, 183 U. S., pp. 105-106,* and in *United States vs. Lynah,* 188 U. S. 469.

In these cases the principle laid down in *Tumpelley vs. Greenbay,* 13 Wall., and *Taylor vs. Chicago,* 125 U. S., etc., were reaffirmed.

In *Cotting vs. Kansas City,* the Court quoted approvingly from *Barbier vs. Connolly,* 113 U. S.:

"The Fourteenth Amendment in declaring that no State

'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property."

And in *United States vs. Lynah*, 188 U. S., pages 469-470, it was said:

"The argument of the defendant is that there is no taking of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation.

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable permanent injury to any extent, can in effect subject it to total destruction without making any compensation, because in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

If the great principles here laid down do not extend to the protection of the New Orleans Gas Light Co. in the use and enjoyment of property lawfully constructed for the public service under a contract grant from the State—she will accept her defeat humbly and reverently—but not without a sense of mortification and shame that such things can be in this land of liberty and justice.

The justice of the thing appeals to the common sense of

right at first sight: it needs but to be stated to be "embraced,"—and then a sophistical scheme of State policy sown in selfishness and nursed in pride lifts up the cold hand of power and crushes the weak appeal of private justice in the desecrated name of the public welfare! So the Supreme Court of Louisiana—even as the defendant had done, when for a time it "compensated" voluntarily the damage which it inflicted,—at first impression recognized that it was lawful and just to do so;—and then yielded its better judgment to the suggestion that the "sovereign" reserved the right to do this thing at his own will and the "subject" has no option but to submit.

Even as Xenophon wondered by what arguments the Athenians persuaded themselves that Socrates had merited death, we wonder by what logic the Court allowed itself to be persuaded that its first conclusions were erroneous: and this, in conclusion, leads to an examination briefly of the final decree of the Court to which the writ of error is taken and the authorities submitted by counsel for defendant which presumably induced the change.

The "Opinion" on the Rehearing;—and the authorities for defendant, anticipated.

Not to go into too lengthy detail, when the Supreme Court of Louisiana rendered its final decree it accepted unqualifiedly the proposition that there was nothing in this case except a question of "regulation" of a public highway. It seems to have accepted the proposition submitted by counsel for defendant that the Gas Company had only "a right of user in the public street along with all other citizens" and that it took this right subject to the police power under which the State "for the public health or the public safety might cause all other structures to be placed in or on such streets" * * * and the consequent injury would be *damnum absque injuria.*

It is hoped that the argument which has been presented answers these conditions and exposes their fallacy.

The object, now, is to submit briefly by way of anticipation a review of the authorities cited by the defendant and accepted by the Court.

At page 107, P. R., the Supreme Court states the authorities which seem to have determined its judgment.

The *Mugler* case, 123 U. S., is cited: it is hardly necessary to say that it has no application. Next, *Mr. Justice Brewers'* decision in *Waterworks vs. Kansas, 28 Fed. Rep. 921.* We have already shown that in that case the company had a mere license revocable at will and the city had reserved to itself the right to designate *where* pipes must be laid.

Cincinnati vs. Penny, 21 Ohio State, is in direct conflict with *Tumpelly vs. Greenbay, Taylor vs. Chicago* and *United States vs. Lynah,* etc., if it decides anything at all: the concluding paragraph strips the decision of all force as an *authority* because the judgment after all is placed on the ground that complainant acquired and owned his property with full knowledge, etc. It was a case of "*volenti non fit injuria.*"

In *Columbus Gas Co. vs. Columbus,* plaintiff had not pleaded the constitutional provision against impairment of contract obligation.

Clapp vs. Spokane, 53 Fed. 516, is a manifest "slip.". Court and counsel evidently overlooked that on a *rehearing* the judgment which is cited was reversed and the final decision makes a direct authority in favor of plaintiff. An injunction at first instance refused was granted because the Court found that the City of Spokane *was financially embarrassed and could not be made to respond to a money judgment for damages.*

State vs. Flower, 49 An. 1199 (La.), has no application whatsoever.

In regard to the other cases cited—in the opinion and in defendant's brief it seems sufficient to say that every one relates to the *surface use of the street as a public highway.* This should be sufficient to differentiate them from the present case. There

is no question of *regulation* of the highway as such involved in this case.

The cases nearest in point are those in which it has been held that where a water or gas company is compelled to change the position of its pipes made necessary by a change of grade in the street, it must do so at its own expense: but in these cases the public work with which the companies came in conflict was prosecuted under the power of regulation and maintenance of streets and public highways as such and the interference was local and limited in extent. There is an obvious and wide difference between "grading a street"—maintaining a highway for public use as such, and establishing throughout the area of the city a system of drainage or sewerage coming in conflict, throughout this area, with mains previously laid under legislative grant, and used for a public purpose of equal necessity or benefit—in comtemplation of law,—as the object for which the new work is intended. It may seem a begging of the question, but an illustration sometimes helps an argument, to say that as the State granted a franchise to one company to establish and operate a gas-plant in the streets of the city, it might instead of constructing a drainage and sewerage work itself have created a private corporation and invested it with the franchise of doing it. Could it be contended that such a corporation would have the right to demand that the mains and conduits of the Gas Company should be put out its way if it so happened that the two things came into conflict?

In their application for "rehearing" counsel for defendant laid special emphasis on the case of *Chicago R. R. vs. Chicago*, 166 U. S. 226.

This case, like the others referred to, deals entirely with the question of "regulation" of the surface use,—the public use of of the street as a street for traffic and travel. The general and primary use of the street must always be preserved. The right of "regulation" in this regard is absolute and persons or corpora-

tions who may have been granted certain privileges upon the streets, as such, must conform to any reasonable regulation even if to do so involves pecuniary expense. This was the issue in that case. 166 U. S.

The question was the right of the city to "lay out" a street across its railway tracks and compel the railroad company to erect gates, place flagmen, etc., at its own expense. This Court held that that was mere "regulation" for safe operation of the road over the public street, "in the maintenance of a public highway" (see syllabus, page 227), that to compel the railroad company to bear the expense was *not a taking or deprivation of property without due proceess of law in violation of the Fourteenth Amendment* but an ordinary expense resulting from the lawful exercise of the power of "regulation."

To emphasize the limitation of the point decided in the case the Court, at page 251 (166 U. S.), gives expression to the following significant reservation:

"If, prior to the institution of these proceedings, the railroad company had constructed upon the land embraced within the crossing, *buildings to be used in its business it would have been necessary for the jury, in ascertaining the just compensation to be awarded, to take into consideration the value of such buildings.* But no such case is before us; the case is *simply one of the opening of street across land without any buildings upon it and used only for railroad tracks.*"

In this case, as in all others involving the same or similar issue, we constantly meet, as a fundamental premise, that persons taking rights *upon* the street must be considered to do so with knowledge of, and acquiescence in, the reserved and "inalienable" power of regulation. The right of the governing power to "regulate" the use of streets as such; to impose conditions on private and public traffic for safety, expedition and convenience, is elemental.

Every one know this and expects it. But can it with the same reason be said that when a gas company or waterworks company acquires a franchise to lay mains and pipes, in the

public domain,—under the streets,—that, notwithstanding the specific grant to an exclusive right to do this,—which in no manner conflicts with the use of the street as a public highway—it has no safer title than if its mains, if such a thing were possible, were laid upon the surface of the street?

The difference in the condition is too obvious for discussion.

In further anticipation of defendants' contention it need only be added that the attempt to bring this case within the principle of *Bass vs. State, 34 Ann. 494 (La.); Rush vs. City of New Orleans, 43, 275 (La.); and Eldridge vs. Trezevant, 160 U. S. 452*, must fail.

The decisions in those cases rested on the prior existence of a "servitude or easement" in favor of the public, on riparian lands—as expressed in the *syllabus* in 160 U. S., p. 452:

"The provisions of the Fourteenth Amendment to the Constitution do not override public rights, existing in the form of servitudes or easements which are held by the courts of the State to be valid under the Constitution and laws."

CONCLUSION.

A few general observations pertinent to the case are respectfully submitted.

It must be remembered that the "Drainage Commission" is given the right to expropriate property: this implies that the Legislature anticipated just such conditions as have arisen: but whether that be so, in the amount of funds placed at the disposal of the "Commission" the possibility of being compeled to expropriate something is provided for.

The attention of the Court is respectfully called to the fact shown in the Record that for the franchise enjoyed by the plaintiff company a constant and very considerable consideration is being paid to the State in furnishing gas free of cost to the Charity Hospital of New Orleans. This obligation was imposed by an act of 1845, amending the original charter of 1835, and has ever been faithfully complied with.

A statement is in the *P. R., page 90*, showing the gas consumed in the *Charity Hospital* from 1894 to 1900, both inclusive. If charged at rates paid by regular consumers this would amount to $38,481.75, the first year's consumption being $3,721.00 and last $6,921.75.

The increase is accounted for by the extensions and additions to the buildings of the hospital. At the minimum rate for prior years and the maximum until the charter expires in 1925, adding the $38,481.25, we reach in round figures the sum of $412,000.00.

The company accepted its charter in 1835, when the city limits were less than one-half of what they are now and its population probably not exceeding fifty thousand. The undertaking of a public work of this character under relatively primitive conditions, where profitable returns are merely a hope of the future,—have been held in themselves sufficient consideration,—not only for valuable franchise, but even for grants of exemption from taxation.

So, now, for sixty years, this company has faithfully performed its duties, extended its works and laid mains, pipes and conduits, without complaint or objection from private or public authorities, in the enjoyment of its franchises, safe in the confidence that its property could not be disturbed or taken away.

Reason, equity and justice, all alike and with equal force, stand on the side of the claimant: can the law be impervious to their combined appeal and permit under its sanction the consummation of a manifest wrong? But the law will not lend itself to such desecration. It has spoken through this Court, and through wise and great expounders throughout the land. Minds imbued with the majesty of their exalted tasks have set the limits within which States can with propriety inflict injury because of the greater good to come; but the injury can be inflicted only on those or such as have voluntarily placed themselves in a position taking the risk either by pursuing a business or occupation in its nature subject to restraint or prohibition, or

using property unlawfully or in a manner and for purposes offensive to health, morals or the good order of society;—or, by accepting privileges, in terms subject to rescission or repeal.

But the principle under which injury may be inflicted in this class of conditions has never been extended to conditions where contract rights are violated or property is taken or damaged for a public purpose which has been lawfully acquired and is used in the pursuit of a lawful private business or for a public purpose explicitly authorized by the sovereign power of the State.

Such is our case: the sovereign himself cannot take back what he has granted in the form of a solemn contract except by the exercise of the power of "Eminent Domain"—for just and adequate compensation.

The Constitution of the United States prohibits this and this Honorable Court has consistently enforced the prohibition.

The company-plaintiff is here invoking the protection of this great principle and prays for relief accordingly.

Very respectfully submitted,

CHAS. F. BUCK,

For Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM, 1904.

NO. 172.

THE NEW ORLEANS GAS LIGHT COMPPANY,
PLAINTIFF IN ERROR.

versus

THE DRAINAGE COMMISSION OF NEW ORLEANS,
THE SEWERAGE AND WATER BOARD,
SUCCESSORS, SUBSTITUTED.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

The New Orleans Gaslight and Banking Company was created by an Act of the Legislature of Louisiana approved April 1st, 1835, Section 37 of which authorized it "*to lay pipes and conduits, at the expense of said Company in any of the streets of said city.*" And by Act approved April 20th, 1870, the Crescent City Gaslight Company was incorporated, and Section 9 of said Act authorized it "*to lay pipes or conduits at the expense of the Company, in any of the streets or alleys of said City of New Orleans, where*

the same may be required, in such manner as may produce the least inconvenience to the City or its inhabitants." On the 29th March, 1875, the two above-named Companies consolidated, and formed one corporation under the name of the New Orleans Gaslight Company, which is the plaintiff in error before this Court.

At the time of the passage of said Acts of 1835 and 1870, there had never been any provision in the Constitutions of Louisiana to the effect that "*Private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid.*" That provision was first placed in the Constitution of 1879 (Art. 156), and reproduced in the Constitution of 1898 (Art. 166).

The Drainage Commission of New Orleans was created by Act No. 114 of 1896, by Section 4 of which it was given full power to control and execute the Drainage of the City of New Orleans, substantially according to plans and specifications adopted by the City Council of said City, and by Section 8 of said Act, as amended by Act 63 of 1898, it was given "*the right in all streets, and in and over all lands of the State in the Parish of Orleans, and of the City of New Orleans * * * for any of its works.*"

It is not necessary to make the above statement any broader, because defendant in error admits that the New Orleans Gaslight Company had a franchise to lay its pipes and conduits in the streets of New Orleans, and the plaintiff in error, in its brief (p. 8), makes the following admission:

> "*The question of fact that the drainage works might*
> "*have been constructed so as not to touch the mains of*
> "*the plaintiff Company, dropped out of the case, and*
> "*we accept as the elemental premise for our legal*
> "*structure the fact stated by the engineer of the Drain-*

" age Commission, that the changes and removal of " gas mains were necessary to carry out the plans " and specifications for drainage."

In the construction of the drainage canals, it was found that certain pipes or conduits of the said Gaslight Company were in the way and said Company was requested to shift the position of same in order to meet the exigencies of the case.

The fact that the Drainage Commission, under advice of counsel, paid the cost of the shifting of such pipes up to a certain date, and, also under advice of counsel, refused to pay the cost of such shifting after said date, and that, by agreement of the parties, the Gaslight Company continued to shift its pipes when necessary and kept an account of the cost thereof to await a final decision by the courts, cannot in any manner, control the decision of the present case.

This suit was filed by said Gaslight Company, to recover from the Drainage Commission, the cost of such necessary shifting of the position of said Company's pipes on the following grounds:

"First. That your petitioner is informed and be- "lieves that the interference with and injury to the "works of petitioner were not absolutely necessary and "the works of the Drainage Commission could have "been constructed without inflicting the loss and dam- "age complained of."

Which said first ground was subsequently abandoned, and,

" Second. If such work was necessary in the " interest of a public work, still, acts done and rights " claimed under pretended authority of said Act No. "114 of the acts of session of 1896, by the defendant, " impair the obligation of the contract between the

" plaintiff and the State of Louisiana, in violation of " Article I, Section 10 of the Constitution of the United " States, and of Article 166 of the Constitution of this " State; or said acts are and constitute a taking or " damaging of private property for a public purpose, " which carries with it and imposes the legal obliga- " tion to make ' just and adequate compensation for " the injury inflicted by such taking or damaging.'

" And petitioner shows that Section 8 of said Act " No. 114, which purports to give to such Drainage " Commission the right to expropriate property—vests " all the power and obligations of the State itself, in " this regard, in said Drainage Commission, and " imposes on said commission liability for property "expropriated or damaged; and in so far as said Sec- " tion 8 confers a ' right in all streets ' in the city of " New Orleans—such ' right ' must be held to have " been conferred subject to prior grants, and to the " extent that this may be denied and absolute right " claimed—said Section 8 especially is, as to petitioner, " null, void and unconstitutional under said Article 1, " Section 10, Constitution of the United States, and " Article 166 of the State Constitution."

Note that the " Fourteenth Amendment " to the Constitution of the United States was not specifically referred to in the petition.

The Supreme Court of Louisiana in a final decision, affirmed the judgment of the lower court and rejected plaintiff's demand, for the reasons stated in its opinion the *syllabus* of which is as follows, to-wit:

(SYLLABUS.)

" 1. The plaintiff Company was authorized by an Act of " the General Assembly prior to the Constitution of " 1879 to lay pipes and conduits in any of the public " ways, alleys and streets of New Orleans where same

"might be required, in such manner as might produce "the least inconvenience to the City or its inhabitants. "It must be held to have accepted this privilege sub- "ject to the paramount and inalienable right of the "State to construct or authorize to be constructed by "the city, sewers or drainage canals under the streets, "whenever, in its judgment, the public interests "demanded, and in aid of the construction of such "sewers to cause the plaintiff Company, at its own "expense, to change the location of its own mains. The "State, in requiring the shifting of the position of the "mains, simply enforced, in its own favor, one of its "reserved rights."

"2. The rights and obligations of the parties are to be "tested by the provisions of the Constitution of 1868." (*1879 in the printed record is a typographical error.*)

"3. This plaintiff had no vested right to occupy any par- "ticular position in the streets, such right as it had "was *ab initio*, not an absolute but an imperfect right "contingent, and [illegible] in its nature, controlled "by law and the regulation of the police authorities."

"4. The only damage claimed in this action is the sum of "money expended by the plaintiff in changing the "position of its mains. It is not asserted that the "pipes of the plaintiff have been injured by removal "nor that any of its work or materials have been or "will be utilized by the State or city for their own "purposes, that the value of the franchise has been "lessened or that there has been any physical 'tak- "ing' of its property.

"This demand of the plaintiff falls under the rule "*of damnum absque injuria.*"

From which decision, the said Gaslight Company has taken a writ of error and has filed the Assignment of Errors, a copy of which is printed on page 9 of its brief.

ARGUMENT.

In commenting upon the case of CHICAGO R. R. vs. CHICAGO, 166 U. S. 226, in which this Court decided that:

> "Expenses of erecting gates, planking the cross-"ing, and maintaining flagmen, which will necessarily "result from the laying out of a street across a rail-"road must be regarded as incidental to the exercise "of the police powers of the State, and do not consti-"tute an element of the just compensation to the rail-"road."

The learned counsel for the plaintiff in error, says at page 39 of his brief:

> "In this case, as in all others involving the same or "similar issue, we constantly meet, as a fundamental "premise, that persons taking rights *upon* the street "must be considered to do so with knowledge of, and "acquiescence in, the reserved and 'inalienable' "power of regulation. The right of the governing "power to 'regulate' the use of streets as such; to "impose conditions on private and public traffic for "safety, expedition and convenience, is elemental."

If the learned counsel admits the correctness of that decision and of the other decisions quoted in the appendix, notably:

MUGLER v. KANSAS CITY, 123 U. S. 623.
CHICAGO vs. QUINCY, 27 N. E. REP. 193.
NATIFNAL W. WORKS CO. vs. KANSAS CITY, 28 FED. REP. 921.
RAILROAD CO. v. WAKEFIELD, 103 MASS. 261.
JAMAICA BOND CO. vs. BROOKLINE, 121 MASS. 5.
COLUMBUS GAS CO. vs. COLUMBUS, 19 L. R. A. 510.

it seems to us that he virtually abandons his case; for, we can see no difference between the right to regulate the sur-

face of the street and the right to regulate the space under the surface. It is certainly as necessary for the health and protection of the people that drainage canals and sewer pipes be laid under the surface, as it is necessary, sometimes, to change the grade of a street, to lay out a street across a railroad right of way, or to widen a water course.

Suppose there were a ridge ten feet high extending through the center of a city from one end to the other and, under franchises granted to a railroad company to lay its tracks on the streets and to a gas company to lay its pipes in the streets, the former had built its road on said ridge and the latter had placed its mains in said ridge. And that with the growth of the city, it became necessary to grade said ridge to the level of the city. There is no doubt that the railroad company, at its own cost, would have to re-adjust its tracks to the new grade. What about the gas company? Would it have greater rights than the railroad company, and would it be entitled to claim from the city the cost of adjusting its mains to the new conditions? Certainly not, the fact that its mains had been placed underground would give it no greater right to compensation than if they had been placed on the surface.

Note that in the case of *Jamaica Bond Co. vs. Brookline,* the action was in damages for the expense of changing the location of water pipes in accordance with a change of grade of the street. The plaintiff alleged that it had laid its water pipes in the street according to the then established grade of the street, and the city had changed the grade and required plaintiff to change the location of its pipes. The Court decided that the injury was *damnum absque injuria.*

In the case of *Columbus Gas Co. vs. Columbus*, the action was for damages for the expense of re-locating gas pipes to conform to a change in the grade of a street. The Court said:

> "A gas company laying its pipes in the streets of a "city, under a grant from the city, in conformity with "an established grade, does so subject to the right of "the city to change the grades of the street whenever "the necessities of the public require it; and, in the ab- "sence of wantonness or negligence on the part of the "city the company cannot maintain an action for dam- "ages occasioned by the necessity of taking up and re- "laying its pipes in order to accommodate them to the "new grade."

The case of *National Water Works Co. vs. Kansas City*, is even more in point, for Mr. Justice Brewer there decided that the plaintiff could not recover for the cost of relaying a water pipe to make way for a sewer, although the water pipe had been originally laid under the direction of the city. Said the learned Justice:

> "Sewerage is a matter unquestionably affecting "largely the public health, and no municipality can "make a contract divesting or abridging its full con- "trol over such matters. * * * * The contract be- "tween the plaintiff and the defendant is to be inter- "preted in the light of this well established rule; and, "so interpreted, the plaintiff took its right to lay its "pipes in the streets of the city, subject to the para- "mount and inalienable right of the city to construct "sewers therein wherever and whenever in its judg- "ment the public interests demand."

The right to construct drainage canals is certainly as great as that to construct sewers. And we confess our inability to see the line which the learned counsel for the plain

tiff in error attempts to draw, between the rights of a company whose mains are underground and those of a company whose tracks are on the surface of the ground.

Why should not the city or the State have the same right to exercise the police power under as well as over the streets? Does not the space under the streets belong to the public as well as that on the surface and that above the surface?

And at the present time, when in all large cities, there are under the streets, gas and water mains and electric wires of railways, telegraph, telephone and electric light companies, besides drainage canals and sewers, the police power must be exercised under as well as on the surface of the streets.

Suppose it became necessary to dig a large open canal in the centre of a city, primarily for drainage, and secondarily for navigation; and that said canal had to cross the tracks of a street railway company at ten or twenty different streets. According to the weight of authority, the railway company would have to build bridges at its own cost to cross said canal, and if levees were necessary on each side of said canal the railway company would have also, at its own cost, to change the grade of its tracks. We believe that the counsel for the plaintiff in error will admit that proposition, or, at least, that he will not dispute it.

Suppose the mains of a gas company, those of a water works company, and the wires of an electric light company, had been laid three or four feet under ground in the streets crossed by said canal, and obstructed the said canal. Would the learned counsel contend that the gas, water and electric light companies would be entitled to the cost of shifting their mains to meet the exigencies of the case? That is virtually the position he takes; but we fail to see why the gas, water and electric light companies should

have such superior rights and should not, like railroads, be subjected to expenses rendered necessary by changed conditions established for the safety, welfare and convenience of the public?

In the case of CLEVELAND vs. CITY COUNCIL OF AUGUSTA, 102 Ga. 233 (L. A. R. 43, 638), the Court said:

> "It has been held, under like provisions, that it was "the duty of a railroad company, though its track was "originally constructed at grade with a public high- "way, to construct a bridge or viaduct whenever the "same might become necessary *(State, Minneapolis vs. "Minneapolis & St. L. R. R. Co.,* 39 Minn. 219); and "that although a crossing might have been adequate "when constructed, yet, if by reason of increase of "business of the railroad or travel on the street, it be- "came dangerous, or seriously obstructed travel on the "street, the company was bound to provide some other "mode of crossing, as by carrying the street under or "over the track. *State, Minneapolis vs. St. Paul M. & "M. R. Co.* 35 Minn. 131, and authorities cited on page "136. Under such a statute the corporation does not "discharge its duty by making such a crossing as to "provide for the wants of travelers at the time of con- "struction of the road. If, by the increase of popula- "tion in the neighborhood, or by reason of the increas- "ing use of the highway, the crossing, which was at "the outset adequate, becomes inadequate, it is the duty "of the railroad corporation to make such alteration as "will meet the present needs of the public who have "occasion to use the highway. *Cooke vs. Boston & L. "R. Corp.,* 133 Mass. 185; 10 *Am. & Eng. R. Cas.* 328. "To the same effect, see Pierce, Railroads, 457, and "authorities cited; 3 Elliott, Railroads, §1111; *English "vs. New Haven & N. Co.,* 32 Conn. 240. The duty "being a continuing one, it is not fulfilled by putting "the street, at the time of building the railroad, in "such condition as not to impair or interfere with its

"use at that time, nor by maintaining it in such con-
"dition as would have accomplished that end had the
"state of things originally existing continued. The
"duty has reference to future exigencies, and requires
"the railroad company from time to time to put the
"streets in such a condition as changed circumstances
"may render necessary. The duty of the railroad
"company to construct and maintain at its own expense
"suitable crossings at the intersections of their rail-
"roads with highways applies as well to highways laid
"out and opened after the construction of the railway
"as those existing prior to its construction. *Chicago &*
"*N. W. R. Co. vs. Chicago,* 140 Ill. 309; *Chicago B. &*
"*Q. R. Co. vs. Chicago,* 166 U. S. 226; *Louisville N. A.*
"*& C. R. Co. vs. Smith,* 91 Ind. 119; *State, Lancaster*
"*County vs. Chicago B. & Q. R. Co.,* 29 Neb. 412.

"We think it follows, as a logical conclusion from
"the principles of law above announced, that, when the
"corporation constructed its tracks across the public
"highway in question, it did so subject to the right of
"the public authorities to require such changes in the
"crossing from time to time as the public safety and
"welfare might demand, or to readjust its track and
"crossings to a change of grade of the street, demanded
"for the safety and convenience of travelers upon the
"highway, and that in doing so the expense incurred
"is involved in its compliance with a police regulation
"of the statute; and we know of no law whereby a cor-
"poration or natural person can recover damages on
"account of being compelled to render obedience to a
"public regulation designed to secure the common wel-
"fare. *Chicago O. A. R. Co. vs. Joliet,* 105 Ill. 388."

It is certainly for the common welfare of the people of New Orleans that the State of Louisiana has created the Drainage Commission and charged it with the control and execution of the drainage of New Orleans, and given it the

right in all streets of said city for any of its works. And whenever the pipes and conduits of the New Orleans Gaslight Company are in the way of the proper execution of the drainage plans, it is but just and proper that said company should readjust its pipes and conduits to permit of the execution of a great work of public utility.

The State of Louisiana, in 1835 and 1870, gave said company the right to lay its pipes and conduits in the streets, but the State never bartered nor abandoned its superior right of control over and in and under said streets.

Unless the New Orleans Gaslight Company can show that it has a right under the street, superior to the rights of railroad on the street, we fail to see why it should be entitled to a compensation that railroads would not be entitled to.

The Supreme Court of Louisiana has decided, in the interpretation of its constitution and of its statutes, that the requirement of the Drainage Commission that the Gaslight Company shift its mains to meet the exigencies of a public work, did not constitute a taking or damaging of property in violation of the articles of its constitution, and that decision is not subject to review by this Court in the absence of a specific point raised in the case that such a requirement violates the provisions of the "Fourteenth Amendment."

The only question raised by the Gaslight Company in its pleadings and in its assignment of errors, is that the acts done by the Drainage Commission under the authority of Act 114 of 1896, are in violation of Article 1, Section 10, of the Constitution of the United States, which forbids a State to pass any law impairing the obligation of contracts.

There is no law in the State of Louisiana by which the contractual rights of the Gaslight Company have been im-

paired. Its right to lay pipes and conduits in the streets is not affected. It is simply required to shift the position of some of its mains. Said company admits the right of the Drainage Commission to require such shifting, but it claims that it is entitled to compensation for the cost of such shifting. We cannot see wherein the Constitution of the United States has been violated.

In 1835 and 1870, when the Gaslight Company was given the right to lay its mains in the streets, the Constitution of Louisiana contained no provision that private property should not be taken or damaged without compensation first being paid.

If, therefore, previous to the Constitution of 1879, the State, through the Drainage Commission, or a similar agency, could have required the shifting of the mains of the Gas Company, in order to make way for a work of public necessity, there is now, in the action of the State, no impairment of the contract of the Gaslight Company.

The briefs of the learned counsel who tried this case in the courts of Louisiana, are so full and convincing, that we print them as an appendix to this brief, and respectfully ask for them the high consideration to which they are entitled.

We shall not discuss the numerous authorities cited in the brief of the distinguished counsel for the plaintiff in error. Many of them expound principles which we do not dispute, and none of them are, in our humble opinion, authority for the contention that the Gaslight Company is entitled to compensation for the cost of shifting its mains.

The learned counsel, however, on page 37 of his brief, calls attention to a "slip" of court and counsel in having quoted the case of *Clapp vs. Spokane,* 53 Fed. Rep. 516, which, he says, was reversed on rehearing. It is true that the injunction originally granted in that case, was subse-

quently refused, but the principles of law announced in the original decision and quoted by court and counsel, were not reversed on rehearing.

But even though the Court and counsel had made a "slip" in quoting from that case, the learned counsel for the plaintiff in error has made two "slips." On page 29 of his brief, he quotes from the case of *Miller vs. N. Y. R. R. Co.*, 21 Barb. 513, having overlooked the fact that said decision had been overruled by the Court of Appeals of New York in *Albany Northern R. Co. vs. Brownwell,* 24 N. Y. 345 (43 L. R. A. 640). And on page 35 of his brief, he quotes as a saying of the Court in *United States vs. Lynah,* 188 U. S. 469, an extract which is a quotation from *Tumpelley vs. Greenbay,* 13 Wall. 166.

The learned counsel has quoted on page 27 of his brief the following section from ELLIOTT, on "Roads and Streets":

> "But the police power is not unlimited, and while "rights to use streets for electric wires and poles are "taken subject to that power, neither the State nor its "municipalities can destroy contracts and vested rights "by improper regulations and enactments under the "guise of the exercise of the police power. It *is gener-"ally held that a right granted by a municipality, by or-"dinance for a valuable consideration, constitutes an ir-"revocable contract, at least where it is accepted and "acted upon by the grantee, and money is expended "upon the faith thereof.* In such cases the vested "right and the obligation of the contract cannot be "materially impaired by attempting to withdraw the "consent of the municipality, or imposing other condi-"tions not contemplated by the contract or law and "not properly police regulations,"

That authority supports our contention. It says that rights to use streets for electric wires are taken subject to the police power. We claim that the right to use the streets for gas mains was taken subject to this same power, and that it is in the exercise of the police power that the State has provided for the construction of a drainage system. The State is not attempting to destroy the vested rights of plaintiff by improper enactments, but is simply asking it to shift its mains in obedience to a most proper enactment. There is no attempt to take the mains of plaintiff and apply them to a public purpose, nor to damage them, nor to withdraw from it any of its charter rights. The same thing is asked of the Gaslight Company which the State could ask of any company having rights on the streets, that is: shift your mains to meet the exigencies of a public work.

But, says the learned counsel, the State and city have the right, in the exercise of the police power, to regulate traffic on the surface of the streets, and, when necessary, to compel railroad and electric light companies at their own expense, to shift their tracks, poles, and wires to suit the necessities of increased population and travel; but gas and water companies, and even electric light companies, whose pipes and conduits are under ground, must be compensated when asked to do the same shifting. Bear in mind that the learned counsel does not claim that companies cannot be made to shift their mains, he simply claims that, because said mains are underground, the cost of shifting them must be borne by the public.

If that argument were correct, here is the curious condition that might arise in the City of New Orleans. The State or the city might provide for the widening of the New Basin or the New Canal, two canals open to navigation and running to the heart of the city. The railroad tracks and the

electric poles on the surface along the edge of said canals would have to be shifted at the expense of the railroad and electric companies, but the gas and water mains under the surface along the edge of said canals, would have to be shifted, but at the cost of the State or city. The mere statement of this proposition is the *reductio ad absurdum*.

We respectfully submit that there was no error in the judgment of the Supreme Court of Louisiana, and that the same should be affirmed.

OMER VILLERÉ,

Special Counsel of the Sewerage and Water Board.

APPENDIX.

The New Orleans Gas Light Company
versus
The Drainage Commission of New Orleans.

SUPREME COURT OF LOUISIANA.

No. 13,897.

BRIEF ON BEHALF OF THE DRAINAGE COMMISSION, DEFENDANT AND APPELLEE.

SYLLABUS.

I.

In creating the Drainage Commission of New Orleans, and in authorizing and directing it to execute a system of drainage for the City of New Orleans, the Legislature was validly exercising the police power of the State in the interest of the health and comfort of its citizens.

Canal & Navigation Co. vs. City of New Orleans, 39 An. 309.

Inhabitants of Melpomene St. vs City of New Orleans, 14 An. 452.

Bass vs. State of Louisiana, 34 An. 494.

II.

The franchise of the plaintiff Company to make use of the public streets of New Orleans was taken, subject to

II.

the implied condition that the State, in the exercise of its police power, might subsequently authorize in such streets other works subservient to the health and comfort of the citizens of New Orleans, the execution of which works might, incidentally, cause damage to the property held by plaintiff under its prior franchise. The loss caused by such subsequently authorized work, when executed with reasonable care, was *damnum absque injuria.*

Bass vs. State, 34 An. 494.
Peart vs. Levee District, 45 An. 421.
Eagan vs. Hart, 45 An. 1360.
Carondelet Canal & Nav. Co. vs. New Orleans, 38 An. 308.
Vidalat vs. City of New Orleans, 43 An. 1121.
Ruch vs. City of New Orleans, 43 An. 275.
Pontchartrain R. R. Co. vs. Levee Commissioners, 570.
Eldridge vs. Trezevant, 160 U. S. 455.
Dubose vs. Levee Commissioners, 11 An. 165.
Nat'l Waterworks Co. vs. City of Kansas, 28 Fed. Rep. 921.
R. R. Co. vs. Wakefield, 103 Mass. 261.
City of Cincinnati vs. Penny, 21 Ohio State, 499.
Brown vs. Duplessis and City of New Orleans, 14 An. 842.
Dillon, Municipal Corporations, Secs. 656, 671.
Lewis on Eminent Domain, Secs. 107, 109.

III.

The principle is well established that the Legislature cannot part with or bargain away any portion of its police power, and from this principle it follows that even if the plaintiff received an exclusive grant and right in and to the space in the streets of the City of New Orleans, occupied by its mains and conduits, such grant

III.

would have constituted no bar to the perfection of a system of drainage.

Butchers' Union vs Crescent City Co., 111 U. S. 746, and authorities cited.

IV.

There was no taking of private property in this case within the sense of the constitutional prohibitions, and no impairment of the contract evidenced by plaintiff's charter. The cases cited by the appellant distinguished and shown to be inapplicable.

STATEMENT OF PROCEEDINGS.

This suit was instituted in the Civil District Court by the New Orleans Gas Light Company against the Drainage Commission of New Orleans. The object of the suit is to recover the sum of $4,065.58, with legal interest from judicial demand, for alleged damages sustained by the plaintiff by reason of the fact that the construction of the new drainage system of the City of New Orleans necessitated the removal of pipes and conduits belonging to the plaintiff, thereby entailing damages and expenses on its part for which it seeks to hold the Drainage Commission responsible. The plaintiff alleged that by virtue of certain Acts of the Legislature mentioned in its petition, it had been granted the exclusive right and privilege of making and selling gas for illuminating and other purposes in the City of New Orleans, for a certain fixed period expiring in the year 1925. That in order to carry out said privilege, it was granted the right to construct and lay through the streets, alleys, and ways of the City of New Orleans, mains, pipes and conduits at its own ex-

pense, as same might be required for the conduct of its business and for the purpose of carrying out the objects of its charter. That the making and selling of illuminating gas, and the delivering of same for consumption, could not possibly be carried on in any other way or manner, and that the laying of such mains, pipes and conduits was and is an absolute necessity to the conduct of its business and to the carrying out of the objects for which the plaintiff was incorporated. That in pursuance of the authority so granted, and for the purposes aforesaid, it had theretofore laid under the surface of various streets in the City of New Orleans its mains, pipes and conduits. It averred further that the privileges granted as aforesaid constituted a contract protected by the Constitution of Louisiana and the Constitution of the United States; that the Drainage Commission, a body created by the Legislature of the State for the purpose of constructing and maintaining a system of drainage for the City of New Orleans, had undertaken, in pursuance of the authority conferred upon it by the Legislature, to construct certain canals, conduits, and drains in and through the streets and public places of the City of New Orleans, and to give to such canals, conduits and drains such dimensions and sections as it might choose, without regard to the rights or property of the plaintiffs or others, and that it had so located and constructed such canals upon streets and places where the pipes, conduits and mains of the Gas Light Company were situated. That in August, 1898, in carrying out said plans of drainage of the City of New Orleans, the proposed canals and mains of the drainage system came in contact and conflict with the mains and conduits of the Gas Light Company. That the Drainage Commission thereupon demanded and required that the Gas Light Company

should remove its conduits and mains so as not in any way to interfere with the canals to be constructed by the Drainage Commission.

This request the Gas Light Company refused to comply with upon the grounds: First, that its property could not be interfered with under any conditions in the manner threatened; and, second, that if, as a matter of law, the object for which the Drainage Commission was created, and the works which it had to construct, involved the exercise of an act of high public nature which would authorize the taking or damaging of private property, yet that such taking or injury could not be consummated without compensation duly and previously made. That in order to avoid the necessity of an injunction, which would have delayed the drainage work, an understanding was reached between the parties that the Gas Light Company should undertake to make the necessary changes in its mains, pipes and conduits, in conformity with the plans made by the engineer of the Drainage Commission, keeping a full and accurate account of the actual cost of such work, and that the Drainage Commission should pay such cost of removal. Accordingly, the Gas Light Company entered upon the removal of certain of its pipes at a cost of $2,481.38, which the Drainage Commission paid. That immediately thereafter, the Drainage Commission notified the Gas Light Company that it had been advised that it was not liable for any such costs, but that the Gas Light Company must remove same at its own expense, and accordingly notified the Gas Light Company that it would bear no further expenses in the premises. That under these conditions, the parties agreed that, without prejudice to the rights of either, the Gas Light Company should continue to make such removals keeping an account of the

cost thereof, and that an amicable suit should be brought to test the liability of the Drainage Commission therefor. That the cost of work of removal thus incurred by it at the filing of this suit amounted to $4,065.58.

The plaintiff further averred that the Drainage Commission was responsible and liable to it for that sum for the following reasons:

1. That the interference with and injury to the works of the plaintiff were not absolutely necessary, and that the works of the Drainage Commission could have been constructed without inflicting the loss and damage complained of;

2. That if such work was necessary for the interest of the public, and though done under sanction of Act 114 of 1896, creating the Drainage Commission, it impaired the obligation of the contract between the plaintiff and the State of Louisiana in violation of the Constitutions of Louisiana and of the United States, and constituted a taking or damaging of private property for public purposes without just and adequate compensation; and

3. That Section 8 of Act 114 of 1896, which purports to give the Drainage Commission the right to expropriate property, vested all of the power and obligations of the State itself in this regard in the Drainage Commission, and imposed upon it liability for property expropriated or damaged; and in so far as said section conferred "a right in all streets" in the City of New Orleans, such right must be held to have been conferred subject to prior grants. And in so far as said act attempted to give such rights regardless of prior grants, it was unconstitutional and void.

The defendant to this petition interposed an exception of no cause of action, which on hearing was overruled. Thereupon, the defendant, reserving the benefit of the ex-

ception above mentioned, answered, denying generally the allegations of the petition; admitting that it was created and organized under the provisions of Act 114 of 1896, and acts amendatory of and supplemental to said act, for the purpose of providing for the drainage of the City of New Orleans; and admitting that it claimed under the provisions of said laws to have authority to establish and construct drainage canals in and through any and all streets and public places of the City of New Orleans where same might be deemed necessary to accomplish the purpose for which it was created, and to give to such canals such location and dimensions as might be necessary to properly drain the city; and further admitting that in the establishment and construction of such drainage canals, it came in contact with the mains and conduits owned and constructed in public streets by the plaintiff Company, and that it required the plaintiff to so remove or change the location and position of its said conduits as not to obstruct or impair the efficiency of said drainage canals. It averred that by the acts of the Legislature aforesaid, it was charged with full power to control and execute the drainage of the City of New Orleans, and was authorized to execute and carry out substantially the plan for such drainage adopted by the Council of the City of New Orleans by Ordinance 10,091, Council Series, approved July 10, 1895, in so far as it might find said plan desirable and practicable, with the right, however, to change or modify the same as in its judgment circumstances might require. That it was further vested with the right of eminent domain, and the right in and through all steets and over all lands of the State and of the City of New Orleans, in the Parishes of Orleans, Jefferson and St. Bernard, and generally with reference to the accomplishment of the con-

struction of said drainage system, was vested with the police power of the State. It further averred that, under the powers so conferred, it had proceeded to the establishment and construction of said drainage system as so adopted by the City Council as aforesaid, save only where same had been modified for its improvement in the judgment of the Commission; and that in the prosecution thereof had proceeded to lay and construct drainage canals of proper and reasonable dimensions in and through various streets of this city. It admitted that the plaintiff Company, claiming authority under certain acts of the Legislature set forth in its petition, had laid under the surface of various streets certain mains and conduits, and that for the proper construction, maintenance, and efficiency of said drainage canals it was necessary and proper that the location of said gas mains and conduits should be, and were required to be changed. It denied, however, that it had acted unreasonably or oppressively, or in anywise illegally, in so requiring the moving of said mains and conduits, and denied that it was indebted to the plaintiff in any sum whatever on that account; but on the contrary, it averred that it had acted in a reasonable and prudent manner, and solely with a view of securing an efficient and proper drainage system, as required by law, and that it had the right to require in the construction of this public work the plaintiff to so conform its mains and conduits as not to obstruct or impair the efficiency of said system.

Upon the issues so made, the cause went to trial, and after the hearing of the testimony and the argument of counsel, judgment was rendered by the Judge of Division E, rejecting the plaintiff's demand at its costs. From this judgment the plaintiff prosecutes this appeal.

IX.

STATEMENT OF THE CASE.

By an Act of the Legislature, passed April 1, 1835, the New Orleans Gas Light & Banking Company was incorporated and was given "the sole and exclusive privilege of vending gas lights in the City of New Orleans and its faubourgs and the City of Lafayette, to such persons or bodies corporate who may voluntarily choose to contract for the same;" to which end it was authorized "to lay pipes and conduits at its own expense in any of the public ways or streets of those localities, *having due regard to the public convenience.*" By amendments of its charter made in 1854, the Company's right to engage in banking was by its consent withdrawn, and the remaining rights granted by the original act were continued to the corporation under the name of the New Orleans Gas Light Company, to be enjoyed until April 1, 1875, when its corporate privileges were to expire. By amendments to its charter made in 1860, its charter was extended to April 1, 1895, the exclusive privilege granted by the original charter not, however, to exist beyond the time fixed in the act of incorporation.

By an Act approved April 20, 1870 (Act 97 of 1870, Extra Session), another Company, under the name of the Crescent City Gas Light Company, was incorporated. The charter provided (Sec. 8) that that Company, its successors and assigns, should for fifty years from the date of the expiration of the charter of the New Orleans Gas Light Company, have the sole and exclusive privilege of making and supplying gas lights in the City of New Orleans. By Section 9, said Company was authorized at any time after the passage of that act, "to lay pipes or conduits at the expense of the Company in any of the streets or alleys of said City

of New Orleans where the same may be required *in such manner as may produce the least inconvenience to the city or its inhabitants;* and provided also that the Company shall afterward repair with the least possible delay the streets they have broken."

By Act No. 106 of 1873 (printed with Acts of 1874), the date of the expiration of the New Orleans Gas Light Company's exclusive franchise was fixed at April 1, 1875, and the franchises granted to the Crescent City Gas Light Company for fifty years from that date were confirmed to it. The Act further declared that Sections 9 and 12 of the Act of 1870 should remain unamended and unimpaired.

On March 29, 1875, the New Orleans Gas Light Company, and the Crescent City Gas Light Company, by proper action of their stockholders, consolidated pursuant to the provisions of Act 157 of 1874, under the name of "The New Orleans Gas Light Company," and the consolidated Company is the present plaintiff in this suit.

Drainage Legislation.

On February 6, 1893, an ordinance was adopted by the City Council of New Orleans, which recited in its preamble the distressing condition into which the drainage of the City of New Orleans had fallen, and the necessity for a uniform and general plan of drainage, and ordained that the sum of $17,500 of the permanent public improvement fund should be set aside and appropriated for the making of a thorough and complete topographical survey of the City of New Orleans, and for the obtaining of all necessary data requisite for the formulation of a complete plan of drainage, and instructing the City Engineer, immediately upon the information being obtained, to prepare and

submit to the Council of the City of New Orleans a complete and comprehensive plan of drainage, with sufficient detail to enable it to be thoroughly understood, and in such form as to designate the manner in which the work could be executed by degrees as money might be appropriated from time to time for the purpose of drainage. It was further ordained that the City Engineer, in conjunction with the Mayor and the Chairman of the Committee on Water and Drainage, should have authority to call, if necessary, an advisory board of expert engineers on drainage for the purpose of confirming by competent authority such plans as might be adopted. (Tr., P. 58.) (Printed Record, p. 83.)

By an ordinance adopted March 30, 1893, the above mentioned ordinance was amended so as to authorize the Mayor to appoint three competent engineers to form an advisory board of engineers for the purpose of approving or disapproving of the plans prepared by the City Engineer; for the making of a topographical survey of New Orleans; and obtaining information necessary for the formulation of a plan of drainage; as also to thoroughly investigate and pass upon such plan of drainage as may be submitted to the City Council for its approval. (Tr., p. 60). (Printed Record, p. 84.) Pursuant to this last named ordinance, the then Mayor appointed Messrs. B. M. Harrod, Rudolph Herring, and H. B. Richardson.

By an ordinance adopted November 24, 1893, the City Council dedicated the sum of $700,000, derived from the sale of franchises of city railroads to Henry Beer, as a sacred fund to be devoted exclusively and solely for drainage purposes. And further provided that plans for the preliminary topographical survey, prepared by the City Engineer

or other persons, should be submitted to an advisory board thereby created, to be composed of H. B. Richardson, B. M. Harrod, Rudolph Herring, R. M. Walmsley, J. C. Denis and Edward Fenner, for approval or recommendation, but that no plan of drainage should be finally adopted by the said advisory board, unless it received the approval of a majority of the City Council. (Tr., pp. 60-61.) (Printed Record, p. 85.) Thereafter this advisory board entered upon the work of formulating a comprehensive and thorough plan for the drainage of the City of New Orleans, and on April 29, 1895, submitted its report in detail to the City Council.

On July 10th, 1895, the City Council, by ordinance adopted and approved with some modifications the plan of drainage submitted by the advisory board. (Tr., p. 62.) (Printed Record, p. 86.)

By another ordinance adopted October 23, 1895, the City Engineer was authorized to secure the services of Messrs. Rudolph Herring, B. M. Harrod and H. B. Richardson, as consulting or advisory engineers on the plans and specifications for the drainage which he was then preparing. (Tr., p. 63. (Printed Record, p. 87.)

This committee of engineers thereupon prepared and submitted to the City Council the specifications for the construction of a system of drainage for the City of New Orleans, which are found at page 65 of the Transcript; and on January 24, 1896, the City Council, after various amendments noted at pages 66, 67 and 68 of the Transcript, (Printed Record, pp. 87, 88, 89), adopted these specifications by a *viva voce* vote.

By an Act of the Legislature approved July 9, 1896 (Act 114 of 1896), the State created a board to be called the

"Drainage Commission of New Orleans," composed of certain designated officials of the City of New Orleans, of the Orleans Levee Board, and of the Board of Liquidation of the City Debt. By Section 4 of said Act said Commission was vested with full power to control and execute the drainage of the City of New Orleans, and authorized to proceed to execute and carry out substantially the plan for such drainage adopted by the City Council of said City by Ordinance 10,091, Council Series, approved July 10, 1895, so far as it might find said plan desirable and practicable, with the right, however, to modify the same as in its judgment circumstances might require. It was further given by said section power to make rules and regulations for the protection and conservation of all works under its control, both completed and incomplete, and of all works necessary or incidental thereto, and making any violation of such rules or regulations punishable by fine. It was further provided by said section that the City of New Orleans should transfer to the custody and control of said Commission so much of the existing drainage plant or plants as the said Commission might deem necessary for their purposes.

By Section 8 of said Act, it was provided that said Commission "* * * shall have the power to expropriate property according to existing laws by legal proceedings in its name; and the right in all streets, and in and over all lands of the State and the City, in New Orleans or in the Parish of St. Bernard, is hereby granted to said Commission for any of its works." The portion of Section 8 above recited was amended by Act 63 of 1898 to read as follows: "* * * and shall have the power to expropriate property according to existing laws by legal proceedings in its

name in the Parishes of Orleans, *Jefferson,* or St. Bernard; and the right in all streets, and in and over all lands of the State *in the Parish of Orleans, and of the City of New Orleans, and in and over all lands of the State in the Parishes of Jefferson and St. Bernard,* is hereby granted to said Commission for any of its works."

CONSTRUCTION OF DRAINAGE WORKS.

Pursuant to the authority of said Act 114 of 1896, the Drainage Commission of New Orleans was organized and proceeded to carry out the plan of drainage mentioned in said Act. (Tr., p. 50.) (Printed Record, p. 30.) And such modifications as were made in the plans mentioned in said act were *in the reduction of dimensions of canals.* (Tr., p. 51.) (Printed Record, p. 30.) The location of all canals, the construction of which is called in question in this suit, is fixed by the plans adopted by Ordinance No. 10,091, C. S., and mentioned in said Act of 1896. (Tr., p. 51.) (Printed Record, p. 30.) So that the canals, the construction of which is called in question here, were in effect located by the Legislature, and the size and dimensions thereof fixed by that body. No testimony or evidence of any kind was offered by the plaintiff to sustain its allegation that "the interference with and injury to the works of petitioner were not absolutely necessary, and the works of the Drainage Commission could have been constructed without inflicting the loss and damage complained of." (Tr. p. 6.) (Printed Record, p. 4.)

The defendant, on the other hand, though it did not bear the burden of proof, proved that the interference was minimized as much as possible. (Tr., p. 53.) (Printed Record, p. 32.)

XV.

No testimony or evidence was offered by the plaintiff to show that the canals and conduits of the Drainage Commission were larger or more numerous than reasonably necessary to efficiently drain the City. On the other hand, the defendant offered proof to show that the location and dimensions of these canals had been fixed by such competent engineers as L. W. Brown, City Engineer, B. M. Harrod, M. B. Richardson and Rudolph Herring (see "Report on Drainage," Tr., p. 62 (Printed Record, p. 87), and approved and ratified by the City Council (Tr., p. 62) (Printed Record, p. 86), and adopted by the Legislature by Act 114, of 1896.

We think, therefore, that it has been shown that said drainage canals were of proper and reasonable size; were properly located with reference to the object for which they were built, and the public interest to be subserved; and were a necessary public work.

By reference to the stipulation of counsel (Tr., p. 72) (Printed Record, p. 91), it will be seen that, in the event of a judgment for the plaintiff, it was agreed that items amounting to $325 were to be deducted from the plaintiff's claim, and items amounting to $170 were to be rejected as in case of non-suit; thus leaving the amount to be recovered in this suit, should judgment be in favor of plaintiff, the sum of $3,570.38.

Points.

I.

In creating the Drainage Commission of New Orleans and in authorizing and directing it to execute a system of drainage for the City of New Orleans, the Legislature was

validly exercising the police power of the State in the interest of the health and comfort of its citizens.

II.

The franchise of the plaintiff Company to make use of the public streets of New Orleans was taken subject to the implied condition that the Legislature in the exercise of its police power might subsequently authorize in such streets other works subservient to the health and comfort of the citizens of New Orleans, the execution of which works might incidentally cause damage to the property held by plaintiff under its prior franchise. The loss caused by such subsequently authorized work, when executed with reasonable care, was *damnum absque injuria.*

(*a*) The franchise of the plaintiff Company itself recognizes the existence of the inherent legislative power to authorize subsequent works of public improvement.

(*b*) The principle is well established that the Legislature cannot part with or bargain away any portion of its police power; and it follows from this principle that even had the plaintiff received an exclusive grant of and right in and to the space in the streets of the City of New Orleans to be occupied by its mains and conduits, such exclusive grant would have constituted no bar to the confection of a system of drainage.

III.

There was no taking of private property in this case within the sense of the constitutional prohibitions and no impairment of the contract evidenced by plaintiff's charter. The distinction between *expropriation* resulting from the exercise of the right of eminent domain, and *appropriation* resulting from an exercise of the police power of the State is well settled.

ARGUMENT.

First Point.

In creating the Drainage Commission of New Orleans and in authorizing and directing it to execute a system of drainage for the City of New Orleans, the Legislature was validly exercising the police power of the State in the interest of the health and comfort of its citizens.

We do not understand it to be contended that Act 114 of 1896 was not a valid exercise of the police power of the State; and the above point is made simply by way of premise to the argument which follows. It may, therefore, be dismissed by a reference to the case of *State vs. Flower, 49 An. 1199*, where this Court sanctioned and upheld the legislation creating the Drainage Commission of New Orleans; and to the following cases which state the general principle:

Canal & Nav. Co. vs. City of New Orleans, 39 An. 309.

Inhabitants of Melpomene St. vs. City of New Orleans, 14 An. 452.

Bass vs. State of Louisiana, 34 An. 494.

Second Point.

The franchise of the plaintiff Company to make use of the public streets of New Orleans was taken subject to the implied condition that the Legislature in the exercise of the police power of the State might subsequently authorize in such streets other works subservient to the health and comfort of the citizens of New Orleans, the execution of which works might incidentally cause damage to the property held by plaintiff under its prior franchise. The loss caused by

such subsequently authorized work, when executed with reasonable care, was *damnum absque injuria.*

(*a*) The franchise of the plaintiff Company itself recognizes the existence of the inherent legislative power to authorize subsequent works of public improvement.

(*b*) The principle is well established that the Legislature cannot part with or bargain away any portion of its police power; and it follows from this principle that even had the plaintiff received an exclusive grant of, and right in and to the space in the streets of the City of New Orleans, occupied by its mains and conduits, such exclusive grant would have constituted no bar to the confection of a system of drainage.

From the foregoing statement of the case, it will appear that the New Orleans Gas Light Company received from the Legislature the right to a certain *user* of the public streets of the City of New Orleans; and that subsequent to this grant, the Drainage Commission was authorized to plan and carry out a system of drainage in and through the same streets, the execution of which system entailed the removing and relaying of the pipes, mains and conduits of the plaintiff, the temporary suspension of its *user* of the said streets, and an incidental damage for which it now claims compensation. The right to recover that compensation is the sole question in this case, and this question is narrowed to a pure legal one by the plaintiff's entire failure to adduce any proof that the defendant unreasonably and oppressively *qua* the said plaintiff, executed the work it was charged with the performance of.

But for this suit it would seem that the question presented had been foreclosed beyond all manner of dispute. both by the decisions of this Court construing the statutes

of Louisiana and by the decisions of other Courts of the highest authority.

In the case of *Bass vs. The State, 34 An. 494,* the question at bar was elaborately discussed.

The State Board of Engineers, under an act giving them authority to that end, constructed certain levees in the Parish of East Carroll. The plaintiff, suing with the consent of the State, evidenced by a special act, set up:

1. That the method pursued in the construction of said levees was improper, and, as to him, oppressive and unnecessary.

2. That whether the work done *was necessary or not,* the State had no right to do the same without making compensation for the resulting damage.

The Court first pointed out that all property, no matter how absolute the title, is held subject to the general police power of the State to be exercised for the general good of the citizens. It then distinguished those governmental acts which are done in pursuance of such police power and which give no rise to compensation; and those which are done in pursuance of the right of eminent domain and which do give rise to a right of compensation. The Court then said:

> "The powers which the State possesses necessarily must be exercised by agents, and are transmissible to them by the State. Where, therefore, the State has the legal right to undertake a public work, the execution of which is likely unavoidably to entail private injury, the State has a right as a corollary of delegating the power to agents, who then are clothed with the necessary incidental authority to do that which the State herself primarily had the right of doing. No injury, wrong, or damage, can be done, or can result

from the commission of an act authorized by law, and therefore none can be recovered. *Lex neminem laedit.* 1 Cal. 462, 4 Cal. 81." (P. 499.)

* * * * *

"If the work done under the act causes injury, the damage thus sustained is not taking of land for public use, and the act is a sufficient defense to an action brought to recover such loss. *Green vs. Swift,* 47 Cal. 549." (P. 502.)

* * * *

"We, therefore, conclude that the State, in the exercise of her police powers, has the exclusive right to determine of the propriety, location, and mode of building levees within her borders; that after she has so decided and has contracted for the public enterprise, a citizen or riparian owner on whose land the levee is about to be built, cannot effectually remonstrate and require that it be constructed differently; and that in case of non-compliance with his demand by the Board of public officers in charge of the work, and in the event of subsequent damages sustained by him, he cannot hold the State liable either for compensation as for property taken for public purposes, or for the injury sustained by him in consequence of the destruction of the same."

To the same effect are the following cases:
Peart vs. Levee District, 45 An. 421.
Egan vs. Hart, 45 An. 1360.

The case of *Carondelet Canal & Navigation Co. vs. City of New Orleans, 38 An. 308,* is not distinguishable from the foregoing, and sanctions our contention.

The plaintiff enjoined the City from widening a certain ditch which lay adjacent to the plaintiff's canal, which widening encroached upon the plaintiff's landing and pre-

vented ingress and egress thereto, so that its commerce was greatly incommoded and obstructed.

The Court held that the City "has control of its streets, and may determine in what manner they shall be improved, and it has equal power over its drainage and can perfect a system that will conduce to the health and comfort of its inhabitants, but it cannot exercise this power recklessly and in wanton disregard of the rights of its inhabitants. The need of enlarging this ditch as a part of the plan to improve the drainage of the City is demonstrated by the testimony, but that may be done and all the benefits derivable from it can be realized without injuring the plaintiff."

The Legislature in the case at bar having authorized a certain plan of drainage, and the plaintiff now before the Court having been damaged by the carrying out of that plan, and making no claim, and adducing no proof, that the work could have been done so as to avoid injury, a certain portion of the language just cited is inapplicable. But none the less the Court recognized the general principle contended for, by dissolving the injunction which had been sued out, in so far as such injunction operated to prevent the defendant from carrying out its work in a proper and reasonable way.

In *Vidalat vs. City of New Orleans, 43 An. 1121,* the plaintiff was the assignee of a market lease. The City let to the Barber Asphalt Co. a contract for the laying of asphalt paving upon a portion of Poydras Street in the vicinity of the Pilie Market. The contractor found it necessary, in order to carry out its contract to tear up the banquettes adjoining the market; and it appears that such banquettes by reason, of the action of the contractor, were rendered impassable for several months, and access to the

market was to a large extent prevented. The plaintiff thereupon sued for damages alleged to arise out of such obstructions. The Court held that such loss was a mere incident to the making of a necessary public improvement, and damages therefor could not be recovered.

In the case of *Ruch vs. City of New Orleans, 43 An. 275,* the question was again reviewed. The plaintiff sought an injunction to restrain the City from appropriating without previous compensation, a portion of his property on Peters Street for the purpose of enlarging that street. He claimed that the City's action amounted to an expropriation, which entitled him to compensation under the provisions of the Constitution of 1879.

The Court again distinguished the right of *appropriation* as an incident of the police power of the State resting upon the servitude vested in the State for the benefit of the public in all land adjacent to public navigable rivers and in all public roads and streets, and the right of *expropriation.* It said:

"This right of *appropriation* which is recognized in the quoted provisions of the Code is, and was co-existent with the right of *expropriation* as provided for in Revised Civil Code, R. C. C. and the R. S., Sec. 1149, *et seq.*

"All of those provisions pre-existed the Constitution with the 155th and 156th articles of which the right of appropriation is said to conflict. This of itself leads to the supposition of their entire compatibility. But the two principles are of well recognized and ancient origin—one being and exercise of the police power, any loss sustained, thereby entitling the injured party to no recompense, the same being *damnum absque injuria;* the other being the execution of the right of eminent domain, the damages entailed being compensable.

"*Bass vs. State,* 34 An. 494; *Chaffe vs. Trezevant,* 38 An. 746."

"The enjoined proceedings were evidently undertaken in pursuance of the police power of the municipality, the object being confessedly the enlargement of the public domain on the Mississippi River front and within city limits; hence, the ordinance was constitutional and valid, for unquestionably, the city had ample authority for the enactment of an ordinance of the character of the one promulgated. The provisions of the Constitution placing restrictions upon the exercise of the power of *expropriation* have no reference to the *police power* of the State, or the municipality in the State. The latter is necessarily an inherent and reserved power of a State, and is practically unlimited—and its exercise is subject to legislative power alone." (Italics by the Court.)

The distinction made in this case between the appropriation which results from an exercise of the police power of the State and the expropriation which results from an exercise of the power of eminent domain was again recognized in the case of the *Pontchartrain R. R. Co. vs. The Levee Commissioners, 49 An. at page 570.* The Court, after stating that there is no "taking of property" in the technical sense where the police power is exerted, said:

> "Any injury that may arise to private property is consequential to the exertion of governmental functions and entirely disconnected with expropriation for public purposes. The distinction between expropriation and consequential injuries arising from the exercise of the necessary functions of Government is stated in one of the cases cited by the defendant. *In the one case, no compensation is due for the reason with others there is no encroachment on private property; in the other there is an expropriation, and hence the owner's right to compensation.*"

The question presented to this Court in this and all the above cited cases, was presented to the Supreme Court of

the United States in the case of *Eldridge vs. Trezevant, 160 U. S. 452,* where a strenuous effort was made to establish the point made in this case, that there was a taking of private property for public purposes which entitled the owner both under the Constitutions of Louisiana and of the United States, to previous compensation.

The Court cited the case of *Dubose vs. Levee Commissioners, 11 An. 165*; *Bass vs. The State 34 An. 494;* and *Ruch vs. New Orleans, 43 An. 275,* with approval, and followed them without hesitation, using the following language:

"In the case of *Bass vs. State of Louisiana,* 34 La. An. 494, the Supreme Court again held that an owner of land abutting on the Mississippi River could not recover for damages inflicted upon his property by the State Board of Engineers and contractors in locating and constructing a public levee, but put the immunity of the State mainly upon the proposition that such public works are done in the exercise of the police power, and did not advert to the doctrine of servitude upon which the previous decision had placed such immunity.

"But we do not understand that the Supreme Court of the State intended thereby to repudiate the doctrine of a servitude explicitly declared in the Code and recognized through a lengthened period by many decisions. If to approve the judgment in that case, it were necessary to hold that the State and its agents can take private property wherever situated, and apply it to any public purpose and escape from the duty of compensation by terming such action an exercise of the police power, it is difficult to see how such a conclusion could be reached by the courts of a State in whose constitution is to be found a provision that private property shall not be taken for public use without just and adequate compensation first made. But, as we have said, it is not necessary to so read the decision in

question, nor to consider whether in such a case a remedy could be found in any provision of the Federal Constitution."

While the removal of the plaintiff's mains and conduits in the interest of a system of drainage appears to us to have been an act within even the narrowest definition of the police power, in view of the foregoing language, we submit that the judgment of the court below can be affirmed upon the ground indicated. Both the streets of the City of New Orleans and the riparian space reserved for the use of the public by law are public things; and the servitude enjoyed by the community in the one cannot be distinguished from that enjoyed by it in the other.

The principle recognized in the foregoing decisions has been recognized and applied in numerous cases arising in other States of the Union.

A case precisely in point is the case of the *National Waterworks Co. vs. the City of Kansas, 28 Fed. Rep. 921.* The plaintiff, in the year 1883, laid down certain water pipes in one of the streets of the City of Kansas. The year after the City dug a sewer in the same street, in consequence whereof, the plaintiff was compelled to take up and lay its pipe in another place. The action was brought to recover the cost and expense of this re-location. The contention that is advanced in the case at bar, was advanced by the plaintiff in the cited case, to-wit, that by laying its pipes in the place and manner authorized and directed by the City, it had acquired such a vested property right in an undisturbed location and possession, as to entitle it to resist any future trespass or invasion thereof; while the contention of the City was that the matter of the sewerage was one affecting public health; that it could not,

if it would; and it did not, if it could, contract away the right to construct sewers in any part of the public streets; and that the plaintiff took its contract right to lay its pipes in such public streets subject to the paramount and inalienable right of the City to construct its sewers wherever therein in its judgment the public interest demands.

The Court sustained the City's contention. It cited the case of *Butchers' Union vs. Crescent City Co., 111 U. S. 746*, sustaining legislation which abolished the exclusive privileges granted to certain butchers to erect and maintain slaughter houses, and permitting, upon certain terms, other slaughter houses, and said:

"The contract between the plaintiff and the defendant must be interpreted in the light of this well established rule; and, so interpreted, the plaintiff took its right to lay its pipes in the streets of the city subject to the paramount and inalienable right of the City to construct sewers therein whenever, and wherever, in its judgment the public interests demand. Laying its pipes subject to this right of the City, it has no cause of action, if, in consequence of the exercise of this right, it is compelled to re-lay its pipes."

A similar ruling is to be found in the case of *R. R. Co. vs. Wakefield, 103 Mass. 261.*

The plaintiffs filed their bill against certain commissioners authorized to widen the draws on the Charleston River Bridge and the Warren Bridge, to restrain them from widening said draws in such a manner as to prevent the plaintiffs from running their cars as usual over those bridges *without interruption.* It appeared from the allegations of the bill that the proposed work would consume from four to six weeks, and that the interruption would

cost the plaintiffs in loss of business about $400 a day. The Court said:

"In our judgment, the right of way granted to the plaintiffs upon these bridges is the same as it is everywhere else, a right to use the highway in common with others. The privilege granted to others of adapting a portion of each bridge to their peculiar mode of conveying passengers, was not intended to give them the control of the way; and upon the bridges, as well as elsewhere, and by these plaintiffs, as well as by all others, the right of passage is to be enjoyed in subordination to the general right of the appropriate public authorities to make from time to time all such needful repairs, alterations, and improvements as the public good may require."

On these grounds, the Court said that it could not view the statute authorizing the change in the bridges "as an encroachment upon the plaintiff's charter, or a withdrawal of any part of their grant," and hence dismissed its bill.

In the case of *City of Cincinnati vs. Penny, 21 Ohio State 499*, the plaintiff sued for damages for injuries to a dwelling situated on a lot abutting a city alley, in which alley a public sewer was constructed. In digging out the sewer, the lateral support to the foundations of the plaintiff's house were withdrawn so that such foundations gave way. The work appeared to have been carefully done and the damage could not reasonably have been avoided. It was held that the plaintiff had to submit to the loss.

As stating the general principle, we further refer the Court to:

Dillon, Municipal Corporations, Secs. 656, 671.
Lewis on Eminent Domain, Secs. 107, 109.

As illustrating the nature of the appellant's right in the streets of New Orleans the leading case of *Brown vs.*

Duplessis and City of New Orleans, 14 An. 842, is instructive. There a property holder sought to enjoin the City from granting a right of way for the establishment of a city railroad on the ground that no portion of the public streets could be appropriated to private use, and on the further ground that such appropriation damaged their abutting properties. The Court held that the streets of the City were destined for public use, but not for any *particular mode* of public use; and hence, the conceded right of pedestrians and vehicles in such streets could not exclude the right of the State to authorize other modes of conveyance. This reasoning applies here. The maintenance of gas mains and pipes is one of the uses, but only one, of which the streets are susceptible. In the nature of things, no exclusive right to any portion of such streets could be granted, and none was granted. As in the laying of its pipes and mains the plaintiff temporarily dispossessed the public of the free use of the streets, so the public has in turn temporarily dispossessed the plaintiff of its acquired use, in order that another needed use of the streets might have place. If the plaintiff can recover damages for such temporary dispossession by the public, then it would seem that members of the public would have had the right to recover for their temporary dispossession by the plaintiff. But the case above cited, in effect, holds that no right to such damages existed; and this decision goes far to supporting the contention of the defendant here.

The foregoing authorities appear to us to dispose of the case; and the following additional considerations are adduced only out of our sense of our duty to present all the points that may bear upon the decision of the important question presented:

(*a*) From the statement of the case heretofore made, it will appear that the Legislature in granting to the Gas Light Company the right to lay and maintain its mains and pipes in the public streets of the City of New Orleans, was careful to stipulate that the laying of such pipes and mains should be done with "due regard to the public convenience" and "in such manner as may produce the least inconvenience to the City or its inhabitants." As the nature of the plaintiff Company's business was, and is, such as to necessitate the frequent laying of new pipes and mains, and the taking up, repairing and re-laying of old ones, it can scarcely be doubted but that the provisions of the charter just cited were intended as an unequivocal expression of the continued right of the State to guard the health and convenience of the public during the whole period that that charter should continue in force. Such stipulations, we submit, are evidence of the retention by and in the State, so far as the plaintiff was concerned, of its general police power; and are wholly inconsistent with the theory here advanced that the State has so absolutely parted with, and the plaintiff has so absolutely acquired, control of the streets of New Orleans, as to disentitle the State from making, by such a designated agency as the Drainage Commission, any further work which might incidentally affect the plaintiff's *user*, no matter to what extent such work might subserve the public health and comfort.

(*b*) Apart from this consideration and from the authorities already cited, the judgment of the court below is fortified by the principle that no Legislature can barter away at the expense of future generations its inherent right to protect the health and morals of its constituents. If it be conceded, as it must be conceded in this case, that drainage is a work which subserves the public health, then it

follows that had the plaintiff's charter contained an express covenant that no person or body corporate should thereafter, or during the term of such charter, receive any right or privilege in the streets of the City of New Orleans of a kind to affect in any way whatsoever the rights already acquired by the plaintiff, such covenant would have been void and would have constituted no bar to the execution of suh a plan as was carried out by the appellee. This point was decided in the case of *Butchers' Union vs. Crescent City, 111 U. S. 746.* The Legislature of the Sate of Louisiana, in the year of 1879, granted the Butchers' Union the exclusive privilege of establishing stock landings and slaughter houses in New Orleans, the privilege to endure for a term of twenty-five years.

In 1881, the City of New Orleans, acting under an authority conferred upon it by the Constitution of 1879, granted further privileges for the establishment of stock yards and slaughter houses to the appellant company. The exercise of these privileges the complainant in the court below sought to enjoin upon allegations that the ordinance granting them impaired the obligation of its contract and was, therefore, null and void. The Court found:

1. That the complainant's grant was an exclusive one. (Opinion, p. 747.)

2. That the grant had all the essentials of a valid contract. (Opinion, p. 749.)

3. That the ordinance of the City of New Orleans impaired the obligation of that contract. (Opinion, p. 749.)

The Court then proceeded:

"The appellant, however, insists that so far as the Act of 1869 partakes of the nature of an irrepealable contract, the Legislature exceeded its authority and had no power

to tie the hands of the Legislature in the future from legislating on that subject without being bound by the terms of the statute then enacted. This proposition presents the real point in the case."

The Court in deciding the point adversely to the appellant, said:

"While we are not prepared to say that the Legislature can make valid contracts on no subject embraced in the largest definition of the police power, we think that in regard to two subjects so embraced, it cannot by any contract limit the exercise of those powers to the prejudice of the general welfare. These are the *public health* and *public morals.* The preservation of these is necessary to the best interests of social organization, and a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime."

"It cannot be permitted that when the Constitution of a State, the fundamental law of the land, has imposed upon its Legislature the duty of guarding by suitable laws the health of its citizens, especially in crowded cities, and the protection of their person and property by suppressing and preventing crime, that the power which enables it to perform this duty can be sold or bargained away under any circumstances as if it were a mere privilege which the Legislature could dispose of at its pleasure." Citing:

Boyd vs. Alabama, 94 U. S. 645.
Moore vs. The State, 48 Miss. 147.
Metropolitan Board vs. Barrie, 34 N. Y. 657.
Beer Co. vs. Mass., 97 U. S. 25.
Stone vs. Mississippi, 101 U. S. 814.
Fertilizing Co. vs. Hyde Park, 97 U. S. 659.

If the State cannot by an express contract divest itself of the power to protect the health and morals of its citizens, and cannot limit future Legislatures in the exercise of that

power, then it follows in the present case, where the charter contains *no express grant of exclusive privileges in the streets of New Orleans, but only the grant of an exclusive right to lay and maintain gas mains and vend gas,* that such privileges in the nature of a use, as was granted, was granted and taken *sub modo* only, and subject to the implied condition that it was to yield when the public interest demanded.

The plaintiff is in precisely the condition that it would have been had its charter expressly provided that the privilege of laying and maintaining pipes and mains in the streets of New Orleans should never be construed as depriving the State of the power of curtailing and interfering with that privilege when the public health required. The law was and is to that effect; and entered into and became, as it were, a part of the plaintiff's charter. As it must be assumed to have taken and to hold its charter subject to such law, it suffers no hardship in the instant case.

Third Point.

There was no taking of private property in this case within the sense of the constitutional prohibitions, and no impairment of the contract evidenced by plaintiff's charter. The distinction between expropriation resulting from the exercise of the right of eminent domain, and appropriation resulting from an exercise of the police power of the State, is well settled.

The whole argument of the appellant as exhibited in its brief, proceeds upon what we conceive to be a transparent fallacy. That fallacy lies in the assertion that there was a taking of property in this case; and in the failure to recognize the settled distinction between appropriation and expropriation already referred to. We have already

cited cases which sufficiently establish and illustrate the distinction, and we deem it only necessary to call the attention of the Court to the inapplicability of the cases cited in support of the appellant's theory.

First as to the Federal cases: The case of *Chicago vs. Taylor, 125 U. S. 161,* does not apply. That was a case where a lot owner in Chicago sued the city for damages arising out of the erection by the city of a viaduct so near his property as to destroy and impede access thereto. The damages claimed were held recoverable under that provision of the Constitution of Illinois of 1870 which provides that no property should "be taken or applied to public use without just compensation being made."

It must be conceded that this case lends some colorable support to the appellant's contention, but it is only colorable, and the decision cannot influence the decision of the case at bar, because:

1. It is in direct conflict with the decisions of this Court construing the peculiar provisions of the law of Louisiana relating to the extent and character of the public servitudes defined by law, and the extent and character of the police power over the public things that are the subject of such servitudes.

2. It is in direct conflict with the decision of the Supreme Court of the United States in another case which went up from Louisiana and involved the constitutionality of the peculiar provisions of the law of Louisiana relating to public servitudes and the applicability of the provisions of the Constitution of 1879 now relied on. We refer to the case of *Eldredge vs. Trezevant, 160 U. S. 452.*

The most cursory examination will show that these two points are well taken.

Upon the first, we refer the Court to the Louisiana cases cited under the second point argued in this brief.

Upon the second, we call its attention to the fact that the Supreme Court of the United States in *Eldredge vs. Trezevant*, cited *Article 661 of the Civil Code*; the cases of *Dubose vs. Levee Commissioners, 11 An. 165; Bass vs. State, 34 An. 494, and Ruch vs. New Orleans, 43 An. 275;* all relied on by the appellee here; and held that these cases, and the codal provisions established the principle that, as far as the State of Louisiana was concerned, it might take property in certain cases without previous compensation made.

Unless, then, this Court is prepared to depart from its own decisions upheld by the tribunal of last resort, the case of Taylor can afford no comfort to the appellant.

The case of *County of San Mateo vs. Southern Pacific R. R. Co., 13 Fed. Rep. 722,* is not at all in point. That suit was one for the collection of taxes. The defense was that the tax was so unequally and unjustly discriminative as to deprive the defendant of its property without due process of law in contravention of the 14th Amendment of the Federal Constitution. There was no question whatever raised as to the extent of the police power of the State; nor was any such question decided; nor was there any question of the right of the State to temporarily interfere with a grant of *user* by reason of its retention of a servitude in the space where the use was granted.

The case of *Hollingsworth vs. Parish of Tensas, 17 Fed. 110,* is wholly inconclusive. The plaintiff was the owner of certain riparian property which was damaged by the construction of a levee. In suing for this damage, the *plaintiff expressly averred an arbitrary and wanton abuse*

by the police jury of the Parish of the powers conferred on it by law for the erection of levees. To this petition, the defendant filed an exception of no cause of action, which the Court overruled, and very properly. But the reasons given for this action are entitled to no respect. If, in fact, the police jury acted oppressively and caused an unnecessary damage to the plaintiff, that entitled her unquestionably to maintain her suit. Whether the police jury did so act was a question which was necessarily determinable only upon the trial; and hence, on the face of the petition, the exception did not lie. But instead of dismissing the exception on this ground, Judge Boarman, in a very rambling opinion, proceeds to hold that compensation can be recovered by a riparian proprietor who is damaged by the construction of levees. This ruling was made, notwithstanding that the Court had called to its attention the provisions of the Civil Code defining public servitudes and the decisions of this Court, and notably Ruch's case, construing those statutes. Its decision proceeded on the theory that the question was one, not of local, but of general law, upon which the decisions of the highest court of this State were not binding on the Federal courts. This theory is so obviously unsound and so utterly in conflict with the fundamental principles which govern the relations of the State and Federal courts, as to render any extended argument unnecessary. It suffices to add that the case, so far as we can discover, has never been cited as authority; and that its *dicta* are by necessary implication entirely disapproved and rejected in the case of *Eldredge vs. Trezevant*, above cited.

The case of *Levis vs. The City of Newton*, reported both in the *75th and 79th Federal Reporters* (*pp. 215, 884*), is equally without application.

It involved simply a construction of the charter powers of the defendant municipality and the right of the complainant to enjoin certain city ordinances which undertook to repeal prior ordinances conferring privileges in the public streets.

As for the case of *Pumpelly vs. Green Bay Co., 13 Wallace, 166,* it is enough to point out that it was pressed by counsel upon the attention of the Court in *Eldredge vs. Trezevant* (Opinion, p. 458), and not considered as in conflict with the conclusion there reached.

The case of *Western Union Telegraph Co. vs. Myatt, 98 Fed., p. 335,* is also beside the issue here. The Legislature of Kansas had created a "Court of Visitation," somewhat akin to the Railroad Commission of Louisiana, and attempted to vest it with judicial power in respect to making rates for certain public-service corporations, including the complainant. On application for an injunction, the Circuit Court held that the attempt to vest judicial power in such a court was in contravention of the Constitution of Kansas and that a proceeding in such a Court to determine the reasonableness of the complainant's rates was not due process of law within the meaning of the Federal Constitution.

The case of *St. Louis & Iron Mountain R. R. Co. vs. Paul, 62 Am. State Rep. 154,* has not, as far as we can see, the slightest bearing on the case at bar. The plaintiff was a laborer and sued to recover damages for failure to pay his wages. The damages sought were authorized by a State statute and were in the nature of a penalty. The defense was that the act was unconstitutional.

The case of *Little Nestucca Road Co. vs. Tellamook County, 65 Am. State Rep. 802,* also presents quite different questions. The plaintiff company had constructed and

was the owner of a toll road. On the petition of certain residents of the county for the opening of a public road, the Court appointed commissioners who made a survey, locating the proposed new road exactly upon the road of the plaintiff and the county court undertook to make an order authorizing the work to be done in accordance with this survey. The carrying out of this order would have involved the destruction of the toll gates and the complete expropriation of the plaintiff's property. A more flagrant case of spoliation attempted under the forms of law would be hard to conceive. The decision was upon a demurrer to the bill, and dealt mainly with questions of pleading and with the right of the County Court to authorize the work.

The Louisiana cases cited by appellant seem to support its contention as little as the foregoing.

The case of *Erwin vs. Telephone Co., 37 An. 63,* presented the single issue as to whether the City of New Orleans had the right to authorize the erection of telephone poles in its streets, and it was held that it had.

The case of *Pontchartrain R. R. Co. vs. Board of Levee Commissioners, 49 An. 570,* has already been cited by us, and is strongly in our favor.

The plaintiff sued for compensation for damage to its railroad caused by the construction of a levee across such road. The damages claimed arose from the depositing of earth dug to make the levee upon the defendant's tracks and the cost of elevating the grade of the road-bed and taking up and re-laying the tracks; all made necessary by the levee. The Court, in holding the plaintiff entitled to compensation, said:

"The front proprietor on the Mississippi River or other navigable rivers must yield without compensation his property for levee and road purposes. The servitude for levee

and road purposes is imposed on him, and he acquires his property subject to that servitude. Civil Code, Articles 6665 *et sec;*. *Bass vs. State,* 34 An. 494; *Rush vs. City,* 43 An. 275; *Eldredge vs. Trezevant,* 160 U. S. 468. *But the plaintiff's land is not on the river and owes no such servitude.''*

This last sentence shows that the case presented was a totally different one from the case here. There was a real taking of private property acquired under a valid franchise, and not a mere interference with a use in public property such as the appellant enjoyed.

The case of *Shreveport & Red River Valley R. R. Co. vs. St. Louis & S. W. Ry. Co., 51 An. 814,* is very easily distinguished from the case at bar. The City of Shreveport had granted to the defendant company a right of way in certain of its streets. The plaintiff company desired to enter the city limits and to obtain a similar right of way through the same streets. There was in them space enough not granted to the defendant company to accommodate the tracks of the plaintiff; but had such tracks been built, and cars attempted to be run over them, such cars would have projected about a foot over the space whose use had already been granted the defendant. In order to obviate any question of technical trespass after construction, the plaintiff brought suit to expropriate, not any of the land occupied by the defendant's tracks, but a right of use in a space of six feet, which six feet made part of the defendant's grant. Having brought such a suit, it was legally bound to aver that no price had been agreed on, and to tender a fair price into the registry of the court. By adopting such a form of proceeding, the plaintiff necessarily admitted the defendant's right to compensation, and precluded itself from contending that it had under its grant from the city the right

to take a portion of the defendant's use without compensation; and from contending that the city had the authority in the exercise of its police power to grant it such a right. It follows that the question presented in this case was not, and could not have been raised in the Shreveport case.

It may be added that it is tolerably clear that neither the State nor its agents can authorize a quasi-public corporation, like a railroad, to interfere with the use of another railroad in such a case as the Shreveport case, without compensation; for the reason that no question of public health, safety or morals being involved, such interference would not be clearly within the scope of the police power of the State. But the authority which the State could not confer and no railroad company could take, could clearly be conferred and clearly be taken and exercised by such a body as the Drainage Commission, whose every function was designed to subserve a recognized necessity of the public health of New Orleans.

This criticism equally applies to the cases cited of *Benson vs. Mayor, 10 Barb. 345, and Miller vs. N. Y. R. R. Co., 21 Barb. 513.*

There are other cases cited by the appellant, but we do not deem it necessary to advert to them specifically, as they all belong to one or the other of the categories, to which the cases we have attempted to distinguish, belong.

In conclusion, we respectfully submit that the judgment of the court below was clearly correct, and should be affirmed.

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New Orleans, January, 1902.

XL.

Brief on Behalf of the Drainage Commission, Defendant and Appellee, on Rehearing.

In this brief, we do not desire that the discussion should take as wide a range as was given to it in the original oral argument and in the original brief, and shall confine the discussion here to two points:

1st. That the Gas Company had only the right of user in the public streets, along with all other citizens, and acquired no right of public ownership or property in or to any part of the public streets by virtue of its charter provisions.

2nd. That it took this right of user subject to the implied condition that the State or the City might, in the exercise of the police power for the public health or public safety, cause other structures to be placed in or on such streets, which might temporarily inconvenience the Gas Company in its use, or which might occasion the removal to another part of the street of its mains and pipes; and that any damage resulting from such temporary inconvenience, or from such removal, was *damnum absque injuria.*

First Point.

The Gas Company has only a right of user in the public streets, along with all other citizens, and acquired no right of private ownership of property in or to any part of the public streets by virtue of its charter provisions.

Whatever may be the rule of law elsewhere, it admits of no question in this State that the fee of property of the public streets in the City of New Orleans is vested in the public at large, and that no abutting owner or any other

person has, or can acquire, any property in or to the soil of a public street. The use of the street is dedicated to the use of the public, and it would not be competent for the State or the City to grant or to give to any particular person or corporation the exclusive use and occupancy of a public street, so as to deprive other citizens, or so as to deprive itself, acting for the benefit of the public, of ever making use of such street for other legitimate purposes. We take it that these propositions are axiomatic.

2 Dill. Mun. Corp. (3 ed.) § 683.

The Legislature in the various acts incorporating the constituent companies which compose the plaintiff Company, never gave to the plaintiff the exclusive right to use the public streets of the City of New Orleans, or the exclusive right to any particular portion of such streets. It is true that it gave the plaintiff Company the exclusive right to sell illuminating gas in the City of New Orleans, but gave it no exclusive right to the use of the streets. As a necessary incident to enable it to carry on its business of furnishing the public with gas, it gave the plaintiff Company the right to lay its mains and pipes under and through all the streets and alleys of this city and impliedly a right to maintain same, provided that such work should be done and maintained with as little inconvenience to the public as possible. Surely, such a grant as this would never be construed as giving the plaintiff Company a property right in or to any particular portion of the street. Neither did the Legislature attempt to designate the particular streets or alleys in which the plaintiff Company should lay its pipes and mains; nor to locate the particular part of the streets or alleys in which such pipes and mains should be laid; nor did it vest any officer or City Council of the City

of New Orleans with authority to locate such pipes, nor to regulate the location thereof. In other words, the whole subject was left to the judgment and at the risk of the Gas Light Company, with only a warning that they should lay them in such manner as to least inconvenience the public. And under such circumstances as these the Gas Company necessarily took the risk of the location of its pipes.

If, therefore, the Gas Company could not acquire any property in the public streets, necessarily its rights were merely the right of user, such a right as any other citizen similarly situated has, or a street railway company has, a right of passage.

It follows as a corollary to this proposition, that neither the State nor the City, by reason of this grant of user to the Gas Company, lost the right of control or use of the streets for other legitimate purposes; and even if the grant to the Gas Light Company was for a public use, yet this did not impair or exhaust the right of the State or City to make other grants, or to build in such streets other works equally for the public comfort or public health.

Chicago Ry. Co. vs. Quincy, 27 N. E. Rep. 192, at p. 193.
Same vs. Same, 28 N. E. Rep., at p. 1070.
Kansas vs. Morley, 45 Mo. App. 304.

While the learned counsel for the plaintiff does not expressly claim any other or greater rights than a right of user in the streets, yet the logical result of his argument is a claim to an exclusive right, or to a property right, in that particular portion of the streets in which the Company's mains are laid. In fact, he is driven to this position, for once he admits that the Company's right is a mere right of user, it inevitably follows, as we shall hereafter see, that the State or City has a right to regulate that user, which is all we contend for in this case.

SECOND POINT.

The Gas Company took the right of user subject to the implied condition that the State or City might, in the exercise of the police power for the public health or public safety, cause other structures to be placed in or on such streets which might temporarily inconvenience the Gas Company in its use, or which might occasion the removal to another part of the street of its mains and pipes; and any damage resulting from such temporary inconvenience, or from such removal, was *damnum absque injuria*.

If our first point is well taken, it remains to be considered what are the rights of the plaintiff in the streets, if it has a right to enjoy the use thereof only in conjunction with, and not to the exclusion of the general public, or of works admittedly of at least equal importance to the health and comfort of the public; and whether its right to use the streets is paramount or subordinate to the rights of the general public.

Our contention in this case is, that the enforced removal of the plaintiff's mains to another part of the street in order to make room for a necessary and important public work, was a mere police regulation of its right of user, and was in no proper sense a taking or damaging of private property or a divesting of any vested right which would entitle it to compensation. In fact, for the purposes of this case, and for the sake of the argument, we might well admit that the plaintiff had a vested right to use *some* part of the streets, and could not be absolutely divested of such right without compensation, and yet not weaken our position, that such vested right could be regulated in a reasonable manner for the public good.

The plaintiff surely can claim no greater or more sacred rights than those which have been conferred upon street

railway companies by the purchase for a valuable consideration paid of franchises to lay tracks and operate cars upon the streets, and yet it could hardly be seriously contended that a street railroad company could object to the paving or other improvement of a street upon the ground that it would subject it to interruptions of traffic and incidental damages resulting therefrom. Many steam railroads entering this city have legislative grants to use the public streets, yet no one would seriously contend that the City has not the right, nevertheless, in the exercise of its police power for the public safety, to require them to erect and maintain at their own expense, gates, at street crossings, or to regulate the speed or the length of their trains, even though compliance with such regulations might impose upon them great expense and much inconvenience; and while it might be admitted that neither the City nor the State could thereafter divest the Railroad Company of its right to use such street, either could undoubtedly regulate that use in a reasonable manner without making compensation or making itself liable for damages.

And in the same way, if it becomes necessary in the prosecution of some great public work in the interest of the public health, to temporarily suspend that use, the Railroad Company would have to submit to the resulting damages.

In the case of *Chicago Railroad vs. Chicago*, 166 U. S. 226, at page 254, the Supreme Court of the United States, treating a similar question and citing the Supreme Court of Illinois said:

" 'The items of expense for which the appellant claims compensation are such only as are involved in its compliance with the police regulations of the Statutes. It is well settled that neither a natural person nor a corpora-

tion can claim damages on account of being compelled to render obedience to a police regulation designed to secure the common welfare. *Chicago Railroad vs. Joliet Railroad*, 105 Ill. 388.

"'And it has been held by this Court in a number of cases that railroad corporations may be required to fence their tracks, to put in cattle guards, to place upon their engines a bell, and to do other things for the protection of life and property, although their charters contained no such requirement (citing authorities). Uncompensated obedience to a regulation enacted for the public safety under the police power of the State, is not a taking or damaging without just compensation, of private property or of private property affected with a public interest. *Mugler vs. Kansas*, 123 U. S. 623, 668; *Boston R. R. vs. County*, 79 Me. 386; *Charlotte R. R. vs. Gibbes*, 142 U. S. 386, 393.'

"We concur in these views. The expense that will be incurred by the Railway Company in erecting gates, planking the crossing, and maintaining flagmen, in order that its road may be safely operated—if all that should be required—necessarily result from the maintenance of a public highway under legislative sanction and must be deemed to have been taken by the Company into account when it accepted the privileges and franchises granted by the State. Such expenses must be regarded as incidental to the exercise of the police power of the State. * * * "

This was a case arising under the Constitution of Illinois, which contained a provision exactly similar to the provision of our Constitution of 1898 regarding compensation for property taken or damaged for public use.

The existence of this right of regulation is essential to the welfare of the public, and without it, the State or City would be powerless to perform its first duty to its citizens, namely, to protect their health, welfare, and safety, in case any prior corrupt or improvident government should have

granted to privileged or favored corporations the right to use the streets of a city. It is recognized that conditions of life change, and what may seem a reasonable and proper use of the streets, or what may seem to be ample protection for the health or safety of the citizen in one generation might be utterly unreasonable or entirely inadequate for another. So it is that the courts have uniformly held that the power to regulate the streets was not only a continuing power, but also an inalienable one.

Chicago vs. Quincy, 27 N. E. Rep. at 193.

In the case of *Mugler vs. Kansas City*, 123 U. S. 623, at pages 664, 665, the Supreme Court of the United States said:

"This interpretation of the Fourteenth Amendment is inadmissible. It cannot be supposed that the States intended by adopting that Amendment to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community. In respect to contracts, the obligations of which are protected against hostile legislation, this Court, in *Butchers' Union Co. vs. Crescent City Co.*, 111 U. S. 746, 751, said that the State could not by any contract limit the exercise of her power to the prejudice of the public health and the public morals. So, in *Stone vs. Mississippi*, 101 U. S. 814, 816, where the Constitution was invoked against the repeal by the State of a charter granted to a private corporation to conduct a lottery, and for which that corporation paid to the State a valuable consideration in money, the Court said: 'No Legislature can bargain away the public health or the public morals. The people themselves cannot do it—much less their servants. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them.'

"Again, in *New Orleans Gas Light Co. vs. Louisiana Light Co.*, 115 U. S. 650, 672: 'The Constitutional pro-

hibition upon State laws impairing the obligation of contracts, does not restrict the power of the State to protect the public health, the public morals, or the public safety as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with the State are subject to the regulations for the protection of public health, the public morals, and the public safety, in the same sense and to the same extent as are all contracts and all property, whether owned by natural persons or corporations.'

"The principle that no person shall be deprived of life, liberty or property, without due process of law, was embodied in substance in the Constitution of nearly all, if not all, of the States at the time of the adoption of the Fourteenth Amendment; and it has never been regarded as incompatible with the principle equally vital, because essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community. *Beer Co. vs. Mass.*, 97 Mass. 25, 32. * * *"

If, therefore, this right of regulation always exists, and cannot be bartered away, all privileges such as that granted to the plaintiff must be understood to have been granted and accepted subject to the implied condition that the State or city, in the exercise of the police power, may regulate, limit or modify that use whenever and wherever the safety, health or welfare of the public demands it. It may be that under our Constitution, the State or the City would not be permitted, without making due compensation, to completely deny or destroy the right, or so unreasonably regulate it as to amount to a denial or destruction, but such is not the case here. While the plaintiff in its petition alleged that the interference with its use of the streets was unnecessary and unreasonable, it offered no proof to sustain that alle-

gation, but on the contrary, the proof in the record is that the regulation was a necessary and reasonable one. So that this case must stand upon the basis of a necessary and reasonable regulation of the plaintiffs' right of use of the streets. The plaintiff has not been deprived of its right to use a single street where its mains have been laid; it has only been required to remove its mains to one side of the street to permit the construction of sewers. The public health required this, and the public would have been inconvenienced had they not been changed; and we believe that it is not unfair or unreasonable to say that the Legislature intended by the provisions in the Company's charter, namely, that it should lay its pipes and mains at its own expense "in such manner as may produce the least inconvenience to the City or its inhabitants"—that the right granted should always be subordinate to the paramount right of the public, and that the Company should at all times yield without compensation to the necessities of the public welfare.

An exhaustive examination of the authorities (prompted by the importance of the questions involved to the City, which is about to enter upon works of great magnitude for the public good) has confirmed us in our opinion that the plaintiff's claim is unfounded. We have found numerous authorities from respectable courts sustaining the views hereinabove expressed, and we state sincerely to the Court that we have been unable to find a single case (except where a statute expressly required the City to pay the expense of removal of structures in streets when necessary for public improvements) in which it has been held that a Gas Company, street railroad, or other corporation having a right to lay its pipes or rails in a street, could recover damages for the expense of removal

thereof or for losses incident thereto, when such removal or losses were occasioned by police regulations designed to protect the public health or safety.

We shall now briefly review some of the cases sustaining our contention stated in the heading under this second point, and for a fuller discussion of the general principles involved respectfully refer the Court to the original brief, which is appended hereto.

National Water Works Co. vs. Kansas City, 28 Fed. Rep. 921 (Mr. Justice Brewer). This was an action for damages. In 1883, the plaintiff company laid a water pipe in one of the streets of the City of Kansas. The grade of this street had been previously established and the plaintiff had been directed by the City to lay a water pipe therein, and the same was laid in the place and manner directed by the City. In 1884, the City dug a sewer on said street in the same part of the street in which the plaintiff's water pipe had been laid, in consequence of which the plaintiff was compelled to take up and lay its pipe in another place. The action was brought to recover the cost and expense of this relocation. That case is even stronger than the case at the bar, in that the City had directed the place and manner in which the plaintiff should lay its main, and the Water Company contended that, under the circumstances, it had acquired such a vested property right in an undisturbed location and position to entitle it to resist any further trespass or invasion thereof. The answer of the City was that the matter of sewerage was one affecting the public health; that it could not, if it would, and that it did not, if it could, contract away the right to construct sewers in any part of the public streets; that the plaintiff took its contract to lay its pipes in such public streets subject to the paramount and inalienable right of the City to construct its sewers

whenever, in its judgment, the public interest demanded. The learned Justice sustained the City's contention, and said:

"Sewerage is a matter unquestionably affecting largely the public health, and no municipality can make a contract divesting or abridging its full control over such matters. * * * The contract between the plaintiff and the defendant is to be interpreted in the light of this well established rule; and so interpreted, the plaintiff took its right to lay its pipes in the streets of the City, subject to the paramount and inalienable right of the City to construct sewers therein whenever and wherever in its judgment the public interest demand. Laying its pipes subject to this right of the City, it has no cause of action if, in consequence of this right, itis compelled to re-lay its pipes. It is true, that petitioner alleges that there was ample room in the street for such a sewer, and it may be that any malicious and unreasonable action by the City in the exercise of the right to construct sewers making damage to the plaintiff, may be the foundation of a claim for damages. But the City is presumed to act without malice, to act reasonably and as in its judgment the interests of the public demand. The mere fact that there is other space which might be occupied by the sewer, while it may be a circumstance tending to show, does not of itself prove that the City acted maliciously or unreasonably; hence, the allegation, as it stands, is not such a one as of itself exposes the City to liability. Under these circumstances, the demurrer of the petition must be sustained."

Railroad Co. vs. Wakefield, 103 Mass. 261. This was an action by the Railroad Company against certain Commissioners who were authorized and directed by law to widen the drawbridges in the Charles River Bridge and in the Warren Bridge, to restrain them from widening the said drawbridges in such a manner as to prevent the plaintiff

Company from running its cars as usual over those bridges without interruption. It appeared that the Commissioners found it necessary, in order to increase the width of the drawbridge, to suspend all traffic over the bridge, and that the work would consume from four to six weeks, and the allegation was that the interruption would cost the plaintiff Company a loss in business of about four hundred dollars a day. The plaintiff Company had a franchise authorizing it to lay its tracks and to operate its cars over and along certain streets of the City and over and across these bridges which formed a connecting link in its street railway line. the Supreme Judicial Court, affirming the lower court, which had sustained a demurrer to this bill, said:

"In our judgment, the right of way granted to the plaintiff upon these bridges, is the same as it is everywhere else, a right to use the highway in common with others. The favor granted to them of adapting a certain portion of such bridge to their peculiar method of conveying passengers, was not intended to give them the control of the way; and upon the bridges as well as elsewhere, and by these plaintiffs as well as by all others, the right of passage is to be enjoyed in subordination to the general right of the appropriate public authorities to make from time to time such needful repairs, alterations, and improvements as the public good may require."

On these grounds, the Court said that it could not view the statute authorizing the change in the bridges "as an encroachment upon the plaintiff's charter or a withdrawal of any part of their grant," and hence dismissed the bill.

Jamaica Bond Co. vs. Brookline, 121 Mass. 5. This was an action for damages to recover expense of changing the location of certain water pipes. Plaintiff alleged that it had theretofore laid water pipes on the street, under its

charter, in accordance with the established grade of the street. That the City had changed the grade and required the plaintiff to change the location of its pipes, to plaintiff's great injury and damage. The Court held that the injury was *damnum absque injuria.*

Columbus Gas Co. vs. Columbus (Supreme Court of Ohio), 19 Lawyers' Reports, Annotated, 510. This was a suit for damages for expense of relocating gas pipes to conform to a change in the established grade of a street made by the City of Columbus. The Court held that: "A gas company laying its pipes in the streets of a city, under a grant from the city, in conformity with an established grade, does so subject to the right of the city to change the grade of the street whenever the necessities of the public require it; and, in the absence of wantonness or negligence on the part of the city, the company cannot maintain an action for damages occasioned by the necessity of taking up and relaying its pipes in order to accommodate them to the new grade."

Cincinnati vs. Penny, 21 Ohio State, 499. The plaintiff sued for damages for injuries to his dwelling, situated on a lot abutting a city alley, in which alley the city had constructed, or was constructing, a public sewer. In digging out the sewer, the lateral support to the foundations of the plaintiff's house were withdrawn, so that such foundations gave way. It appeared that the work had been carefully done, and that the damage could not reasonably have been avoided. It was held that the injuries sustained were *damnum absque injuria.*

Clapp vs. City of Spokane, 53 Federal, 516. This was a suit for an injunction to prevent the City of Spokane from interrupting the operations of an electric street railway by

constructing a sewer in one of the streets in which the railway was located. The railway was double tracked, and occupied the middle part of the street, having a single line of poles situated in the space between the tracks supporting cross-beams from which the wires were suspended. It was owned and operated by a corporation to which the city had given franchises authorizing the construction mentioned. It was proposed to put a sewer in the center of the said street in such a manner as to necessitate the taking down of said poles and obstructing of the tracks so as to prevent the operation of the railway during the time to be consumed in its construction. The bill of complaint alleged that this construction was wholly unnecessary, as there was a space of forty feet wide in the street on the outside of each track. It was contended on the part of the City that a sewer in said street was essential to the public welfare, and that the city had power to construct it; that the City had control of said street and of every part of it, and might, if necessary, for the accomplishment of any public work which it was authorized to undertake, obstruct it and suspend all travel therein; that the franchise of the Railway Company was subordinate to the power of the City to control said street, and the City might even require the owner of it to remove the railway at its own expense, if necessary, for the purpose of putting a sewer in said street.

The Court, passing upon this contention, said:

"While the power of the City is ample, it is also limited. The validity of its ordinance must be tested by the rule that reason must control its conduct, and the courts are required to shoulder the burden of deciding what is reasonable whenever individuals complain of unreasonableness in the provisions of City ordinances affecting them

(1st Dill. Mun. Corp., 3d Ed., Secs. 319, 321), and in the exercise of all the powers of a municipal corporation, the bounds of necessity and reason must not be overstepped to the injury of private rights. Now, is it unreasonable and oppressive for the City, after having by its ordinances authorized the construction of this street railway and designated the particular part of the street to be occupied by it, with ample room elsewhere in the street, to so locate a sewer as to cause the greatest damage to the Railway Company? I think that it is, and that the proposed action of the City is, therefore, an unlawful exercise of its power. There may be a sufficient reason for putting the sewer in the center of the street, which can be shown by the defendants when they answer the bill, but as no necessity or reason appears from the statements contained in the bill, the demurrer cannot be sustained on this ground.

"The bill avers that it is possible to construct a sewer in the center of the street without interfering with the railway. But as the contrary is not alleged, I assume that it would be impracticable to do so on account of the additional cost; and, I have, therefore, treated this as an immaterial allegation. I hold that the City is not required to incur any considerable additional expense by reason of having granted a free right to the use of the streets for this railway."

It is clear from this reasoning that the Court was of the opinion that, if the necessity existed for the construction of this sewer in the middle of the street, that the Railway Company would have to bear the loss incident thereto.

We respectfully submit to the Court, that all of these cases are directly in point with the case at bar and should be decisive of the issues here; that all of the cases cited by the learned counsel for the plaintiff present a different state of facts, and are cases where there was a direct in-

vasion of private property actually owned in fee by the parties complaining, and none of them are cases where the party complaining held a mere right of user in a public street.

In conclusion we desire to call the Court's attention: First, to the great importance of this case to the City Government of New Orleans and to the citizens of this City. This City is about to inaugurate works of public improvement of great magnitude and of inestimable value and importance to the health of the City, all of which are being done in the exercise of the police power of the City, and if this Court should decide that the City could not carry on these great public works without compensating the street railway companies, gas companies, water works companies, electric light companies, telephone companies, telegraph companies, and innumerable other corporations to whom grants and franchises in the public streets have heretofore been made, a great part of the funds voted by the people for these necessary public works will be dissipated in paying damages for loss of business, inconvenience, the expenses of removals and repairs on the part of all of these corporations, and in the expenses of litigation interminable. And furthermore, it would forever debar the City of New Orleans from making any public improvements in the streets, or from exercising its police powers for the safety and comfort of its citizens, unless it should pay tribute to any corporation or person whose business or affairs might be inconvenienced or damaged by such works. In the second place, as your Honors' original opinion seems to have conveyed the idea to some, that it was a denial of the fact that the Drainage Commission, a State institution expressly created by the State for the purpose of this great work, was not vested with any part of the police power of

the State, we desire to call your Honors' attention to the fact that this question has been before the Court and it was expressly decided that, in the performance of this drainage work, the Drainage Commission was exercising the police power of the State in that respect.

State vs. Walter C. Flower and Others, 49 An. 1199, at p. 1202.

We, therefore, respectfully submit that your Honors should set aside the judgment heretofore rendered, and affirm the judgment of the lower court.

Respectfully submitted,

HOWE, SPENCER & COCKE,

Of Counsel for the Drainage Commission.

Supreme Court of the United States.

No. 172.—October Term, 1904.

The New Orleans Gas Light Company, Plaintiff in Error, vs. The Drainage Commission of New Orleans, The Sewerage and Water Board, Successors, Substituted.	In error to the Supreme Court of the State of Louisiana.

[April 3, 1905.]

The New Orleans Gas Light and Banking Company was incorporated in 1835, and was given the exclusive privilege of vending gas in the city of New Orleans and its faubourgs, and the city of La Fayette, to such persons or bodies corporate as might voluntarily choose to contract for the same, and it was permitted to lay pipes and conduits at its own expense in the public ways and streets of New Orleans, having due regard for the public convenience. In 1845 and 1854 the charter of the company as to its right to engage in banking was withdrawn, and the right to vend gas and use the streets was continued to the corporation under the name of the New Orleans Gas Light Company until April 1, 1875, when its corporate privileges should end, the company during the continuance of its charter to furnish the Charity Hospital with necessary gas and fixtures free of charge. By amendments the contract privilege of the company was extended until April 1, 1895, the exclusive privileges granted by the original charter not to extend beyond the time fixed in the act of incorporation. In 1870 another company, under the name of the Crescent City Gas Light Company, was incorporated, its charter providing that the company, its successors and assigns, should for fifty years from the expiration of the charter of the New Orleans Gas Light Company have the sole and exclusive privilege of making and supplying gas light in the city of New Orleans, and for that purpose be allowed to lay pipes and conduits in the streets and alleys of the city where the same may be required, at its own expense, in such manner as to least inconvenience the city and its inhabitants, and the company was also required to afterwards repair with the least possible delay the streets it had broken. In 1873 an act of the legislature fixed the date of the expiration of the exclusive franchise of the New Orleans Gas Light Company at April, 1875, and the franchise of the Crescent City Gas Light Company was confirmed from that date for the period of fifty years. On March 29, 1875, the New Orleans Gas Light

Company and the Crescent City Gas Light Company were consolidated under the name of the former corporation. This company is the plaintiff in the action in the State court. By an act of the legislature, approved July 9, 1896, the State created a board known as the Drainage Commission of New Orleans, which board was given the power to control and execute a plan for the drainage of the city of New Orleans, and also the power to appropriate property according to the laws of the State, by legal proceedings, for the purpose of constructing a drainage system. After adopting a system of drainage, and proceeding with the construction thereof, according to the plans, it was found necessary to change the location in some places in the streets of the city of the mains and pipes theretofore laid by the New Orleans Gas Light Company. The testimony shows that there was nothing to indicate that these changes were made in other than cases of necessity and with as little interference as possible with the property of the gas company. By stipulation between the parties it was agreed that the charges should be paid by the gas company when it became necessary to accede to the demands of the Drainage Commission; the gas company should keep an account thereof, and that its right to recover for the amount expended by it should not be prejudiced by the arrangement made, but should be submitted to the courts for final adjudication. This action was brought to recover the cost of the changes so made. In the court of original jurisdiction there was a judgment in favor of the Drainage Commission. Upon appeal the Supreme Court of Louisiana reversed this judgment. Upon rehearing the latter judgment was reversed and a final decree rendered, affirming the judgment of the lower court, rejecting the claim of the gas company. (111 La. Rep. 838.) A writ of error to this court brings into review that judgment, the contention being that the judgment of the State court has impaired the contract rights of the gas company and has the effect to take its property without compensation, in derogation of rights secured by the Constitution and the Fourteenth Amendment.

Mr. Justice DAY delivered the opinion of the Court.

In the case of the *New Orleans Gas Light Company* v. *Louisiana Light Company*, (115 U. S. 650,) it was held that the complainant, by reason of the franchises granted and agreements made, as fully set forth in that case, had acquired the exclusive right to supply gas to the city of New Orleans and its inhabitants through pipes and mains laid in the streets.

It is the contention of the plaintiff in error that, having acquired the franchise and availed itself of the right to locate its pipes under the streets of the city, it has thereby acquired a property right which cannot be taken from it by a shifting of some of its mains and pipes from their location to accommodate the drainage system, without compensation for the cost of such

changes. It is not contended that the gas company has acquired such a property right as will prevent the Drainage Commission, in the exercise of the police power granted to it by the State, from removing the pipes so as to make room for its work, but it is insisted that this can only be done upon terms of compensation for the cost of removal. This contention requires an examination of the extent and nature of the rights conferred in the grant to the gas company. The exclusive privilege which was sustained by this court in the case of the *New Orleans Gas Light Co.* v. *Louisiana Light Co., supra,* was the right to supply the city and its inhabitants with gas for the term granted. There was nothing in the grant of the privilege which gave the company the right to any particular location in the streets; it had the right to use the streets, or such of them as it might require in the prosecution of its business, but in the original grant to the New Orleans Gas Light and Banking Company the pipes were to be laid in the public ways and streets, "having due regard to the public convenience." And in the grant to the Crescent City Gas Light Company the pipes were to be "laid in such manner as to produce the least inconvenience to the city or its inhabitants." In the very terms of the grant there is a recognition that the use of the streets by the gas company was to be in such manner as to least inconvenience the city in such use thereof. Except that the privilege was conferred to use the streets in laying the pipes in some places thereunder, there was nothing in the terms of the grant to indicate the intention of the State to give up its control of the public streets, certainly not so far as such power might be required by proper regulations to control their use for legitimate purposes connected with the public health and safety. In the case above cited, in which the exclusive right to supply gas was sustained, there was a distinct recognition that the privilege granted was subject to proper regulations in the interest of the public health, morals and safety. Upon this subject Mr. Justice Harlan, speaking for the court, said (115 U. S. 671):

"With reference to the contract in this case it may be said that it is not, in any legal sense, to the prejudice of the public health or the public safety. It is none the less a contract because the manufacture and distribution of gas, when not subjected to proper supervision, may possibly work injury to the public; for the grant of exclusive privileges to the plaintiff does not restrict the power of the State, or of the municipal government of New Orleans acting under authority for that purpose, to establish and enforce regulations which are not inconsistent with the essential rights granted by plaintiff's charter, which may be necessary for the protection of the public against injury, whether arising from the want of due care in the conduct of its business or from any improper use of the streets in laying gas pipes, or from the failure of the grantee to furnish gas of the required quality and amount. The constitutional prohibition upon State laws impairing the obligation of contracts does not restrict the power of the State to protect the public health, the public morals or the public

safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a State are subject to regulations for the protection of the public health, the public morals and the public safety, in the same sense and to the same extent as are all contracts and property, whether owned by natural persons or corporations."

The drainage of a city in the interest of the public health and welfare is one of the most important purposes for which the police power can be exercised. The Drainage Commission, in carrying out this important work, it has been held by the Supreme Court of the State, is engaged in the execution of the police power of the State. (*State of Louisiana* v. *Flower*, 49 La. An. 1199, 1203.)

It is admitted that in the exercise of this power there has been no more interference with the property of the gas company than has been necessary to the carrying out of the drainage plan. There is no showing that the value of the property of the gas company has been depreciated nor that it has suffered any deprivation further than the expense which was rendered necessary by the changing of the location of the pipes to accommodate the work of the Drainage Commission. The police power, in so far as its exercise is essential to the health of the community, it has been held cannot be contracted away. (*N. Y. & N. E. Railroad* v. *Bristol*, 151 U. S. 556, 567; *Butchers' Union* v. *Crescent City Co.*, 111 U. S. 746, 751; *Stone* v. *Mississippi*, 101 U. S. 814, 816.) In a large city like New Orleans, situated as it is, and the entrepôt of an extensive commerce coming from many foreign countries, it is of the highest importance that the public health shall be safeguarded by all proper means. It would be unreasonable to suppose that in the grant to the gas company of the right to use the streets in the laying of its pipes it was ever intended to surrender or impair the public right to discharge the duty of conserving the public health. The gas company did not acquire any specific location in the streets; it was content with the general right to use them, and when it located its pipes it was at the risk that they might be, at some future time, disturbed, when the State might require for a necessary public use that changes in location be made.

This right of control seems to be conceded by the learned counsel for the plaintiff in error, in so far as it relates to the right to regulate the use of the surface of the streets, and it is recognized that the users of such surface may be required to adapt themselves to regulations made in the exercise of the police power. We see no reason why the same principle should not apply to the sub-surface of the streets, which, no less than the surface, is primarily under public control. The need of occupation of the soil beneath the streets in cities is constantly increasing, for the supply of water and light and the construction of systems of sewerage and drainage, and every reason of public policy requires that grants of rights in such sub-surface shall be held subject

to such reasonable regulation as the public health and safety may require. There is nothing in the grant to the gas company, even if it could legally be done, undertaking to limit the right of the State to establish a system of drainage in the streets. We think whatever right the gas company acquired was subject in so far as the location of its pipes was concerned, to such future regulations as might be required in the interest of the public health and welfare. These views are amply sustained by the authorities. (*National Water Works Co.* v. *City of Kansas*, 28 Fed. Rep. 921, in which the opinion was delivered by Mr. Justice Brewer, then Circuit Judge; *Columbus Gas Light & Coke Co.* v. *City of Columbus*, 50 Ohio St. 65; *Jamaica Pond Aqueduct Co.* v. *Brookline*, 121 Mass. 5; *In re Deering*, 93 N. Y. 361; *Chicago R. R. Co.* v. *Chicago*, 166 U. S. 226, 254.) In the latter case it was held that uncompensated obedience to a regulation enacted for the public safety under the police power of the State was not taking property without due compensation. In our view, that is all there is to this case. The gas company, by its grant from the city, acquired no exclusive right to the location of its pipes in the streets, as chosen by it, under a general grant of authority to use the streets. The city made no contract that the gas company should not be disturbed in the location chosen. In the exercise of the police power of the State, for a purpose highly necessary in the promotion of the public health, it has become necessary to change the location of the pipes of the gas company so as to accommodate them to the new public work. In complying with this requirement at its own expense none of the property of the gas company has been taken, and the injury sustained is *damnum absque injuria*.

We find no error in the judgment of the Supreme Court of Louisiana and the same is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.